(21,056.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1909.

a

No. 1365.

United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant

vs.

HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON, Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Nevada.

1 In the United States Circuit Court of Appeals, Ninth Circuit

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order Extending Time to Docket Cause.

Good cause therefor appearing, it is hereby ordered that the time wherein defendant and appellant in the above-entitled action may file the record thereof and docket the case with the clerk of this Court, at San Francisco, California, may be enlarged and extended, so as to extend to and include the 23d day of September, 1906, and it is so ordered.

Dated this 22d day of August, 1906.

WM. W. MORROW, *Circuit Judge.*

[Endorsed]: No. 1365. In the United States Circuit Court of Appeals, Ninth Circuit, District of California. Henry Wood et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Order Extending Time. Filed Aug. 24, 1906. F. D. Monckton, Clerk. Refiled Aug. 29, 1906. F. D. Monckton, Clerk.

2 In the Circuit Court of the United States for the District of Nevada.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Nevada:

Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, of Lyon County, Nevada, and citizens of the State of Ne-

vada, bring this their bill against the Rickey Land and Water Company, a corporation organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, in the county of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada; and thereupon your orators complain and say:

1. That your orators are citizens of the State of Nevada, and reside in Lyon County, Nevada, and within the District of Nevada.

2. That the defendant, the Rickey Land and Cattle Com-
3 pany, is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City, in the County of Ormsby, in the said State of Nevada, and within said District of Nevada, and is a citizen of the State of Nevada.

3. That on the 10th day of June, 1902, Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, exhibited to and filed in this court its bill of complaint against one Thomas B. Rickey, and against your orators and against many other persons, which suit is numbered 731 on the equity docket of this court.

4. That thereafter, on the said 10th day of June, 1902, this Court duly issued its writ of Subpœna in said suit upon said bill of complaint, directed to the said Thomas B. Rickey, your orators, and the other persons made defendants by said bill; and thereafter, on the said 10th day of June, 1902, the said writ of subpœna was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon your orators and upon the other defendants in said suit.

5. That thereafter the said Thomas B. Rickey entered his appearance in said suit, and thereafter filed in this court his plea to the jurisdiction of said court, which plea was overruled by this
Court, and the said Thomas B. Rickey was by this Court
4 ruled to answer to said bill of complaint, and he has answered the same.

6. That your orators and the other defendants in said suit have entered appearances in said suit; and the said suit is now pending and undetermined in this court as to all of the defendants thereto.

7. That in and by the said bill of complaint the said Miller & Lux (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner and seized in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said district of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River, which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, and that said lands include the banks, bed, and stream of said river; and further alleged that, at divers times therein set forth, the said Miller & Lux, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters of said river, amounting in all

to a flow of nine hundred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second, and that it and they had carried the same from said river to and upon certain lands and used the same for the irrigation thereof, and that the said Miller
5 & Lux was then the owner of such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that, within three years next before the filing of said bill, the defendants thereto, including the said Thomas B. Rickey and your orators, had, and that each of them had, diverted the waters of said Walker river at divers places on said river above the said lands of the said Miller & Lux, and above the points at which the said Miller & Lux so diverts said water, and that a large portion of said water so diverted by the defendants in said suit is never returned to said river, and that said defendants to said suit are continuing the diversions aforesaid, and have thereby deprived and are depriving the said Miller & Lux of a large portion of said water to which the said Miller & Lux is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water, and are so diverting the same, under claim of right so to do, and adversely to the said Miller & Lux, and further alleged that, by the diversions aforesaid, the said Miller & Lux has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable and so long as said diversions are continued will be unable, to irrigate its said lands which it had theretofore been accustomed to irrigate, and is thereby ren-
6 dered unable and will *me* unable to properly or successfully cultivate the said lands or to raise crops thereon; and further alleged that, if the defendants to said suit or either of them has any right to divert any water from said river, such rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by the said Miller & Lux, and its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of the said Miller & Lux so infringed by the said acts of the defendants to said suit, exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

8. That, in and by the said bill of complaint, the said Miller & Lux, among other things, prayed that the defendants to said suit, including the said Thomas B. Rickey and your orators, be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said Miller & Lux so diverts the same, in such manner or to such extent as to deprive your orator of any of the water aforesaid, and also for general relief.

9. That thereafter, to wit, on the 6th day of August, 1902, and after the filing of the said bill of complaint, and after the service upon the said Thomas B. Rickey of the writ of subpœna in said suit, and after the said Thomas B. Rickey had appeared therein,
7 the said Thomas B. Rickey caused the defendant, the Rickey Land and Water Company, to be organized and incorporated and it was, on that day, organized and incorporated under the laws of the State of Nevada.

10. Upon and according to their information and belief, your orators aver that the only person really interested in said corporation defendant, or really owning any of the stock thereof, is the said Thomas B. Rickey, and that the other persons forming the said corporation and holding the stock thereof are only nominees of the said Thomas B. Rickey, and hold their said stock solely for him and for his benefit.

11. That, as your orators are informed and believe, the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid, was the owner and had, for a long time theretofore, been the owner of certain lands situated on the said Walker River, and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River, and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do.

12. That after the said incorporation and organization of the said Rickey Land and Cattle Company, the defendant herein, the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid, and all the rights owned or claimed by him to
8 divert any water from the said Walker River; and the said defendant corporation has ever since claimed to be the owner of said lands and water rights.

13. That thereafter, to wit, on the 15th day of October, 1904, the said defendant, the Rickey Land and Cattle Company, commenced an action in the Superior Court of the County of Mono, State of California, against your orators and against a large number of other persons, which action is numbered 1055 on the register of said Superior Court.

14. That said action was commenced by said defendants, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and had been since the 6th day of August, 1902, the owner, in possession and entitled to the possession of certain of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constituted one entire contiguous bond of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said West Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner, in the possession of, and en-
9 titled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of the said West Fork of said Walker River and its tributaries in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have

their source in the State of California, and from thence flow through the eastern part of the said State of California, into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claim some right, title and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof, in the West Fork of the Walker River, that said right, title and interest so claimed by said defendants and each of them, including your orators, in and to said water is without right, and that all claims of them and each of them to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant
10 herein (plaintiff therein), and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second.

15. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment, and entitled to the possession, use and enjoyment, of, and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California, to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and that said Court further adjudged that neither of the defendants therein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said West Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orators, are estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors, or assigns, any right, title, claim, in-
11 terest or estate in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second; and also for general relief.

16. That, on the said 15th day of October, 1904, the defendant herein, as plaintiff, commenced another action in said Superior Court of said County of Mono, State of California, against your orators and against a large number of other persons, which action is numbered 1056 on the register of said court.

17. That said action was commenced by said defendant, as plaintiff therein, by the filing of a complaint, in and by which the said defendant (plaintiff therein) alleged, among other things, that it is, and has been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of the rest of the lands

aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constitute one entire contiguous body of land, over, through and upon which flows, and from time immemorial has flowed, a certain branch or tributary of said Walker River called the East Fork of the Walker River, and that said lands and all thereof are, and from time immemorial have been, riparian to said East Fork of said river, and situated along and bordering thereupon; and further alleged that the said defendant
12 (plaintiff therein) is the owner, in the possession of, and entitled to the possession, use, and enjoyment of, and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and that both of said branches have their source in the State of California, and from thence flows through the eastern part of the said State of California into and through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claim some right, title, and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of five hundred and four (504) cubic feet of water per second, or some part or portion thereof, in the East Fork of the Walker River; that said right, title, and interest so claimed by said defendants and each of them, including your orators, in and to said water is without right, and that all claims of them and each of them to the waters of said East Fork of said Walker River
13 are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein), and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of five hundred and four (504) cubic feet of water per second.

18. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner, in the possession, use, enjoyment and entitled to the possession, use and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California, to the extent of a constant flow of five hundred and four (504) cubic feet of water per second; and that said Court further adjudged that neither of the defendants herein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them,

including your orators, are estopped to claim or assert against the defendant herein (plaintiff therein) its grantees, successors, or assigns, any right, title, claim, interest, or estate in or to any
14 of the waters now flowing, or which may hereafter flow, in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than five hundred and four (504) cubic feet of water per second; and also for general relief.

19. That, on the 20th day of December, 1904, your orators, the said Henry Wood, J. O. Birmingham and Charles Snyder filed in this court, in the said suit so brought by the said Miller & Lux against the said Thomas B. Rickey and others, No. 731, their cross-bill; in and by which cross-bill the said cross-complainants alleged, among other things, that they were, and for a long time prior thereto had been, the owners of certain rights in the waters of the said Walker River, and certain appropriations therein made by them, their grantors and predecessors in interest, and further alleged that, within three years next before the filing of said cross-bill, said Thomas B. Rickey had diverted the waters of said Walker River at divers places on said river above the lands of said cross-complainants, and above the points at which said cross-complainants so diverted the same; that a large proportion of said water so diverted by the said Thomas B. Rickey is never returned to said river, and that he is continuing the diversions aforesaid, and has thereby deprived and is depriving the said cross-complainants of a large portion of said water to which they are so entitled; that each of
15 said diversions so made by the said Thomas B. Rickey is without right, but that he has so diverted said water and is so diverting the same under claim of right so to do, and adversely to said cross-complainants; and therein and thereby the said cross-complainants prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said cross-complainants so divert the same, in such manner or to such extent as to deprive said cross-complainants of any of the water aforesaid; and also for general relief.

20. That, on the 20th day of December, 1904, your orator Charles Johnston, filed in this court, in the said suit so brought by the said Miller & Lux against the said Thomas B. Rickey and others, No. 731, his cross-bill, in and by which cross-bill the said cross-complainant alleged, among other things, that he was, and for a long time prior thereto had been, the owner of certain rights in the waters of the said Walker River, and certain appropriations therein made by him, his grantors and predecessors in interest; and further alleged that, within three years next before the filing of said cross-bill, the said Thomas B. Rickey had diverted the waters of said Walker River at divers places on said river above the lands of said cross-complainant, and above the point at which said cross-complainant so di-
16 verted the same; that a large proportion of said water so diverted by the said Thomas B. Rickey is never returned to said river, and that he is continuing the diversions aforesaid, and has

thereby deprived and is depriving the said cross-complainant of a large portion of said water to which he is so entitled; that each of said diversions so made by the said Thomas B. Rickey is without right, but that he has so diverted said water and is so diverting the same under claim of right so to do, and adversely to said cross-complainant; and therein and thereby the said cross-complainant prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River, above the points where the said cross-complainant so diverted the same, in such manner or to such extent as to deprive said cross-complainant of any of the water aforesaid; and also for general relief.

21. That thereafter, on the said 20th day of December, 1904, this Court duly issued its writ of subpœna in said cross-suits upon said cross-bills, directed to the said Thomas B. Rickey; and thereafter, on the said 20th day of December, 1904, the said writs of subpœna were duly served by the marshal of this district upon said Thomas B. Rickey.

22. That, upon the filing of said two complaints in said Superior Court, there was issued out of said Court in each of said ac-
17 tions a writ of summons thereupon, which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 26th day of December, 1904, and after the service of the said writs of subpœna upon the said Thomas B. Rickey, the said writs of summons were served upon your orators and upon each of them.

23. That by the laws of the State of California an action is commenced in the courts of that State merely by the filing of a complaint, and that from and after the filing of such complaint such action is deemed to be pending in the Court in which such complaint is filed.

24. That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orators, and said other persons are, so far as concerns your orators, the same issues which were tendered by the said cross-bills of complaint of your orators so filed in this Court, so far as the same related to the defendant, Thomas B. Rickey, in said suits.

25. That, at the time of the filing by the defendant herein of its complaints aforesaid, the said defendant did not have or claim to have, and does not now have or claim to have, any right whatever in or to any of the waters of said Walker River, or of any
18 branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey.

26. That the defendant herein, in and by the actions aforesaid, intended, and the necessary effect of said action is, to bring on for trial and determination in said Superior Court the same issues presented by the said cross-bill of complaint of your orators in the said suit so brought in this court, so far as relates to the issues between your orators and the said Thomas B. Rickey, and to obtain from

said Superior Court a judgment determining said issues in advance of a determination of the same by this court, and thereby to defeat the jurisdiction of this court in the said suit so now pending before it, and to hinder and embarrass this court in the trial of said issues, and in the enforcement of any decree which this court may render in the said suit so pending before it; and further prosecution of said actions, or either of them, as against your orators would therefore be in derogation of the jurisdiction of this court and of the rights of your orators in the cross-suits so brought by them in this court, and now pending therein.

27. That the matter in dispute herein, to wit, the right of your orators to maintain their cross-suits aforesaid without hindrance from or interference by any other court, exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000).

19 And your orators allege that all of the said acts, doings and claims of the said defendant herein are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this kind are properly cognizable and relievable, to the end therefore that your orators may have that relief which they can attain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, and that the said defendant, its agents, servants and attorneys, and all persons acting in aid of them or either of them, be enjoined and restrained from further prosecuting, as against your orators, either of the said actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions against your orators, and that your orators may have such further or other relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orators a writ of subpœna, to be directed to said defendant, the Rickey Land and Cattle Company, a corporation, commanding it, at a certain

20 time, and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, direction, and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from further prosecuting, as against your orators, either of the said actions so brought by it in the said Superior Court of the County of Mono,

State of California, and from taking any further step whatsoever in either of said actions as against your orators.

And may it further please your Honors to make and issue an order requiring the said defendants, the Rickey Land and Cattle Company, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction pendente lite, as above prayed for, should not be issued; and, at the same time, and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants
21 and attorneys, and all persons acting in aid of them or either of them, until the hearing of such order to show cause, and until the further order of this Court, from doing all or any of the acts aforesaid.

HENRY WOOD,
J. O. BIRMINGHAM,
CHARLES SNYDER,
CHARLES JOHNSTON,
Complainants.

A. M. KIDD,
Solicitor for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Alexander M. Kidd, being duly sworn, deposes and says, that he is the solicitor for the complainants above named; that said complainants are at a considerable distance from the court, and their verifications cannot be obtained in time; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes the same to be true.

ALEXANDER M. KIDD.

Subscribed and sworn to before me this 3d day of January, 1905.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

22 [Endorsed]: No. 790. In Equity. Circuit Court of the United States for the District of Nevada. Henry Wood et al., Complainants, vs. Rickey Land & Cattle Company, Defendant. Bill of Complaint. Filed January 4th, 1905. T. J. Edwards, Clerk. A. M. Kidd, 124 Sansome Street, San Francisco, Cal., Solicitor for Complainants.

Subpœna ad Respondendum.

DISTRICT OF NEVADA, *ss:*

The President of the United States of America, to the Rickey Land and Cattle Company, a Corporation, Greeting:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States, for the District of Nevada, in the Ninth Judicial Circuit, on the 6th day of February, 1905, to answer unto a bill of complaint exhibited against you in said court by Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston; and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, hereunto
23 affixed, at Carson City, Nevada, on this 4th day of January, 1905, and of the year of the Independence of the United States the 129th.

Attest:

[SEAL.] T. J. EDWARDS, *Clerk.*

A. M. KIDD,
Solicitor for Complainant.

Memorandum:—The defendant is to enter its appearance in the above mentioned suit, in the clerk's office at Carson City, Nevada (Federal Building), on or before the day at which the above subpœna is returnable, otherwise the bill may be taken pro confesso.

T. J. EDWARDS, *Clerk.*

United States District Court, District of Nevada.

No. 790.

HENRY WOOD, JAMES BIRMINGHAM, CHAS. SNYDER, AND CHAS. JOHNSTON
vs.
THE RICKEY LAND AND CATTLE CO., a Corp'n.

Return.

I certify and return that I received the within and hereto annexed "Subpœna to appear and answer complainant's bill," on the 4th day of January, 1905, together with a certified copy of order to
24 show cause; also certified copy of complaint, in the above-entitled case, and personally executed same on Thos. B. Rickey, of Carson City, Nevada, on the 5th day of January, 1905, by exhibiting to said Thos. B. Rickey the original of said subpœna, and leaving in his possession a copy thereof, together with said cer-

tified copy of order to show cause and also said certified copy of complaint.

Dated Carson City, Nevada, January 5, 1905.

Fees, 2 services, $8.00.

ROBERT GRIMMON, *U. S. Marshal.*

[Endorsed]: No. 790. U. S. Circuit Court, District of Nevada. Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnston, vs. The Rickey Land & Cattle Company, Corporation. Subpœna to Appear and Answer Complainants' Bill. Filed on Return, January 5, 1905. T. J. Edwards, Clerk.

25 In the Circuit Court of the United States for the District of Nevada.

No. 790.

HENRY WOOD, J. C. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order to Show Cause Why Injunction Pendente Lite Should not Issue.

Good cause appearing therefor, by the verified bill of complaint of Henry Wood, J. O. Birmingham, Charles Snyder, and Charles Johnston, complainants, on file herein, it is ordered that the said defendant, the Rickey Land and Cattle Company, a corporation, show cause before this court, on the 13th day of March, 1905, at the hour of ten o'clock A. M., at the courtroom of this court at Carson City, Nevada, why an injunction should not issue pending this suit, according to the prayer of said bill.

And it further appearing to the Court that there is danger of irreparable injury from delay, it is therefore further ordered that, until the hearing and determination of said motion for in-

26 junction and until the further order of this Court the said defendant, Rickey Land and Cattle Company, a corporation, its agents, servants and attorneys and all persons acting in aid of them or either of them, be and they are hereby enjoined and restrained from further prosecuting, as against said complainants, either of the two certain actions brought on the 15th day of October, 1904, by the said Rickey Land and Cattle Company, as plaintiff, against Miller & Lux, a corporation, said complainants, and others, as defendants, in the Superior Court of the County of Mono, State of California, and respectively numbered on the register of said Superior Court, 1055 and 1056.

And it is further ordered that a copy of this order be served upon the said corporation defendant, and on one of its attorneys (namely,

on either Mr. James F. Peck, or Mr. Charles C. Boynton, or Mr. William O. Parker), on or before the 30th day of January, 1905.

THOMAS P. HAWLEY, *Judge.*

[Endorsed]: No. 790. Circuit Court of the United States for the District of Nevada. Henry Wood et al., Complainants, vs. Rickey Land & Cattle Company, Defendant. Order to show Cause Why Injunction Pendente Lite Should not Issue. Filed January 4th, 1905. T. J. Edwards, Clerk.

27 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD ET AL., Complainants,
vs.
RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Affidavit of Thomas B. Rickey.

STATE OF NEVADA,
County of Ormsby, ss:

Thomas B. Rickey, being duly sworn, deposes and says: That he is one of the defendants in the bill of complaint in the action commenced herein, No. 731, wherein Miller & Lux, a corporation, is complainant, and Thomas B. Rickey and others, are defendants; and that he is, and since its organization has been, the president of the Rickey Land and Cattle Company, a corporation, defendant herein; that he is not now, nor has he at any time since the organization of said corporation, been the manager of said corporation; that the manager of said corporation is, and at all times since the organization has been, one Charles Rickey, and that the active
28 management of the said corporation and its affairs has been conducted by the said Charles Rickey.

It is provided by the laws of the State of California, in section 738 of the Code of Civil Procedure of said State, as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

That under the laws of the State of California, a person or corporation may commence and prosecute an action to final judgment in the Superior Court of said State to quiet and determine his or its title to real estate and water, and the use of water, flowing in the streams in said State, against any person or corporation claiming an adverse interest or title to such real estate, or to such water, or to such use of water.

That the Rickey Land and Cattle Company, a corporation, was organized on the 24th day of July, 1902, by Thomas B. Rickey, the affiant, Charles W. Rickey and Alice B. Rickey, who were the incorporators and subscribers to the capital stock of said corporation; and the said corporation was not organized on the 6th day of August, 1902, by the affiant, and was at no time organized by the affiant, except in so far as he participated with those associated with him in the organization of said corporation. That the purposes for which said Rickey Land and Cattle Company was organized were: "To buy and sell and own and to reclaim farm and graze lands; to locate and buy and sell water and water rights, and to use the same for irrigation and mechanical purposes; to build and construct dams and reservoirs and to store water therein for the purposes of irrigation and distribution and sale; to buy and sell and raise all kinds of livestock, hay and grain, and to do all kinds of farming business and to engage in all kinds of agricultural and dairy pursuits and business, and to engage in and to do a general merchandizing business, all in the States of California, Nevada and elsewhere." That pursuant to the purposes expressed in said articles of incorporation the said corporation acquired by conveyance certain lands and certain water rights of said Thomas B. Rickey, the affiant, on the 6th day of August, 1902, part of which said lands are described in the complaints in said suits commenced in said Mono county, referred to in the complaint herein.

That the said Rickey Land and Cattle Company acquired by conveyance from said Thomas B. Rickey all his right, title and interest to certain water rights, and rights to the use of water; and the said water rights, and rights to the use of water, are in part the water rights and rights to the use of water, described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey, are not the same rights to water, and rights to the use of water, alleged in said complaints in said Mono County in this, that since the conveyance of said lands by said Thomas B. Rickey, and said water rights, and the right to the use of water, to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County, for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated and used such water adversely to all the world, and under

a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusively and peaceably.

That under the laws of the State of California, the adverse possession and use of water for a period of five years by the person or corporation claiming the right to said water, and its grantors and predecessors in interest, confers a title and right to the continued use of said water. By the laws of the State of California it is provided: "Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will, or succession. Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

That Charles Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company;

32 and that Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all times since the organization of said corporation have been, in the absolute control of said stock, free from any right by interference, management or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive, and have received, all the profits earned by said stock so owned and held by them, for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and said Alice B. Rickey is about forty thousand dollars.

That the Rickey Land and Cattle Company, a corpora-

33 tion, mentioned in the complaint herein, is not a defendant in the original complaint filed in that certain action, No. 731, referred to in the complaint herein, wherein Miller & Lux is complainant, and affiant and others, are defendants; nor has the said corporation been made a party by any order of this Court.

Affiant denies and says that it is not true that the only person really or at all interested in said corporation, the Rickey Land and Cattle Company, or really, or otherwise, owning any of the stock thereof, is the said affiant, Thomas B. Rickey. And denies and says it is not true that the persons, other than Thomas B. Rickey, affiant, forming the said corporation, the Rickey Land and Cat-

tle Company, or holding stock thereof, are only nominees of the said Thomas B. Rickey, or that they hold their said stock solely, or at all, for him, or for his benefit.

That in the complaints in the actions commenced in Mono County, State of California, as alleged in the complaint herein, it is not alleged that the lands described in said complaints, or any of them, were conveyed to the plaintiff in said actions by the said Thomas B. Rickey, nor is any reference therein had to any conveyance or transfer by said Thomas B. Rickey to the said plaintiff in said action.

Affiant denies and says that it is not true that the complainants, Henry Wood, J. O. Birmingham, Charles Snyder and
34 Charles Johnston, or either of them, filed in this court the cross-bills, or any cross-bills, alleged in the complaint herein to have been filed, but in this behalf alleges that the said so-called cross-bills were not brought as such, and were and are, original bills.

Affiant denies and says that it is not true, that the issues, or any issue, tendered by said complaints in said two actions, or either of them, brought by the defendant, the Rickey Land and Cattle Company, herein, as plaintiff in said actions, against the complainants herein, and other persons, are, so far as concerns complainants herein, or either of them, the same issues, or any issue, which were tendered by the said alleged cross-bills, or either of them, mentioned in the complaint herein so filed in this court.

Affiant denies that at the time of filing by the defendant, the Rickey Land and Cattle Company, herein, of its complaints in the Superior Court of said County of Mono, State of California, or at any other time, the said defendant, the Rickey Land and Cattle Company, did not have or claim to have, or does not now have or claim to have, any right in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such right or rights, if any, as was acquired by said Rickey Land and Cattle Company by said conveyance alleged in the complaint herein to have been made to it from the said Thomas B. Rickey, affiant.

35 Denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in and by the actions, or either of them, commenced in the said Superior Court of the County of Mono, State of California, intended, or that the necessary or any effect of said actions, or either of them, is to bring on for trial or determination in said Superior Court, the same issues, or any issue, presented by the said cross-bills, or either of them, alleged to have been filed by the complainants herein in the said action, No. 731, wherein Miller & Lux is complainant, and the said affiant and others, are defendants.

And denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions commenced in said Superior Court of Mono County, is to obtain from said superior Court a judgment determining the issues, or any of them, presented by the

said cross-bills, or either of them in said complaint mentioned, in advance of a determination of the same by this court, or to do anything else therein, or to cause any other action to be taken by said Court for the purpose of defeating, or which will defeat, the jurisdiction of this court in the said suit alleged in complainants' complaint.

And the said affiant denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in-
36 tended, and that the necessary, or any, effect of said actions, or either of them, so commenced in the Superior Court of Mono County, is to hinder or embarrass, or will hinder or embarrass, or that any action of said defendant in said Superior Court of Mono County, or any action of said Superior Court of Mono County in said actions, or either of them, will hinder or embarrass this court in the trial of the issues, or any of them, in said suit, or in the enforcement of any decree which this court may render in the said suit so pending before it.

And denies and says that it is not true that the further prosecution of said actions, or either of them, as against the complainants herein, or either of them, would be in derogation of the jurisdiction of this court, or of the rights, or any right, of the complainants, or either of them, in the cross-suits alleged in the complaint herein.

And in this behalf affiant alleges that the said actions so commenced in Mono County, and each of them, are brought in good faith, regardless of any effect they may have upon the said suit of Miller & Lux vs. T. B. Rickey and others, No. 731, in this cause, for the purpose of having and procuring a judgment quieting the title of said Rickey Land and Cattle Company to the said waters, water rights, and the use of the waters described in said
37 complaints in said actions commenced in Mono County, State of California, and are so brought at this time because the said Rickey Land and Cattle Company, and its officers, deem such action prudent and necessary, because of the old age and infirmity of many of the witnesses whose testimony is necessary to establish the rights of said Rickey Land and Cattle Company to the said waters, and rights to the waters, and rights to the use of waters described in said complainants in said actions commenced in Mono County, State of California, as against the defendants in said suits, and because the relief sought in said actions so commenced in the Superior Court of Mono County cannot be obtained in any other court.

Affiant further denies and says that it is not true that all, either, or any of the said acts, doings, or claims of the defendant, Rickey Land and Cattle Company, herein, are contrary to equity or good conscience, or that they, or either of them, tend to the manifest, or any, wrong, injury, or oppression of the complainants, or either of them, in the premises.

Wherefore, the affiant, on behalf of said Rickey Land and Cattle Company, prays that this Court deny the petition herein.

THOMAS B. RICKEY.

Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[SEAL.] CHAS. H. PETERS,
Notary Public, in and for Ormsby Co., Nevada.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

HENRY WOOD ET AL., Complainants,
vs.
RICKEY LAND AND CATTLE COMPANY, Defendant.

Affidavit of Charles Rickey.

STATE OF CALIFORNIA,
County of Inyo, ss:

Charles Rickey, being duly sworn, deposes and says: That he is, and at all the times mentioned herein was, a citizen of the State of California, over the age of twenty-one years and a resident of Topaz, county of Mono, State of California. That he is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of
39 said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation. That Thomas B. Rickey does not now own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation
40 to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1,575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per

second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

CHARLES W. RICKEY.

Subscribed and sworn to before me this 10th day of March, 1905.

[SEAL.] P. W. FORBES,
Notary Public in and for the County of Inyo, State of California.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

HENRY WOOD ET AL., Complainants,
vs.
RICKEY LAND AND CATTLE COMPANY, Defendant.

41 *Affidavit of Alice B. Rickey.*

STATE OF NEVADA,
County of Ormsby, ss:

Alice B. Rickey, being duly sworn, deposes and says: That she is, and at all the times mentioned herein was, a citizen of the State of Nevada, over the age of twenty-one years and a resident of Carson City, County of Ormsby, State of Nevada. That she is and since the organization of the corporation defendant, has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in her own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation. That Thomas B. Rickey, does not now own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and
42 is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant

corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of said West Fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1,575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

ALICE B. RICKEY.

43 Subscribed and sworn to before me this 13th day of March, 1905.

[SEAL.] CHAS. H. PETERS,
Notary Public in and for Ormsby County, Nevada.

[Endorsed]: No. 790. In the Circuit Court of the U. S., Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, v. Rickey Land & Cattle Company, a Corporation, Defendant. Affidavit of Thomas B. Rickey, Charles Rickey and Alice B. Rickey to the Order to Show Cause why Injunction Should not Issue Restraining Action in Mono County. Filed March 13, 1905. T. J. Edwards, Clerk.

In the Circuit Court of the United States for the District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation, Defendant.

44 *Order for Injunction Pendente Lite.*

The motion of the above-named complainants requiring defendant, Rickey Land and Cattle Company, a corporation, to show cause why an injunction should not issue pending this suit, according to the prayer of the bill of complaint herein, having come on regularly to be heard upon said verified bill, and upon affidavits by the defendant in opposition thereto, and the Court having heard the arguments of counsel for the complainants and defendant, and the same having been duly considered by the Court, and it appearing to the Court that said complainants are entitled to an injunction pending this suit, according to the prayer of the bill herein:

Now, therefore, it is hereby ordered, adjudged and decreed, that said defendant, the Rickey Land and Cattle Company, a corporation,

its agents, servants and attorneys, and all persons acting in aid of them or any of them be, and they are hereby enjoined and restrained from further prosecuting as against said complainants, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, either of the two actions brought by said defendant, the Rickey Land and Cattle Company, on the 15th day of October, 1904, in the Superior Court of the County of Mono, State of California, against said Henry Wood, J. O. Birmingham, Charles Snyder and Charles
45 Johnston, and others, as defendants, and respectively numbered 1055 and 1056 on the register of said Superior Court, and from taking any further step whatsoever in either of said actions as against said Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, pending the final hearing and determination of this suit, and until the further order of this Court.

And it further appearing to the satisfaction of this Court that this injunction may be safely granted without requiring any bond from said complainants herein, it is further ordered that the writ of injunction may be issued herein as aforesaid without any bond being furnished by said complainants.

Dated June 25th, 1906.

THOMAS P. HAWLEY, *Judge.*

[Endorsed]: No. 790. In the Circuit Court of the United States for the District of Nevada. Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, Complainants, v. The Rickey Land and Cattle Company, a Corporation, Defendant. Order for Injunction Pendente Lite. Filed June 25th, 1906. T. J. Edwards, Clerk.

46 In the Circuit Court of the United States for the Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Petition for Appeal.

The above-named defendant, Rickey Land and Cattle Company, a corporation, conceiving itself aggrieved by the interlocutory order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled case, wherein it was ordered and decreed that the said defendant be enjoined and restrained from further prosecuting as against Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, either of the two certain actions brought by the defendant on the 15th day of October, 1904, in the Superior Court of Mono County,

State of California, respectively numbered 1055 and 1056 on
47 the Register of Actions of said Superior Court, and from taking any further steps whatever in either of said actions as against said Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, pending the final hearing and determination of the said above-entitled suit and until the further order of said Circuit Court.

And the said Rickey Land and Cattle Company, a corporation, prays that this, its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the record and proceedings and papers upon which said interlocutory decree, order and judgment was made, duly authenticated, may be sent to said United States Court of Appeals for the said Ninth Circuit.

And now, at the time of filing this petition for appeal, the said Rickey Land and Cattle Company, a corporation, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be argued in the United States Circuit Court of Appeals for the said Ninth Circuit.

And your petitioner will ever pray.

RICKEY LAND AND CATTLE CO., INC.,
By T. B. RICKEY, *President*,
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Defendant.

48 [Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood, et al., Complainants, vs. The Rickey Land and Cattle Company, a corporation, Defendant. Petition for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Offices, 911 Laguna St., San Francisco, Calif.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, J. O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Assignment of Errors.

Assignment of errors on appeal from the order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause, on the complaint of Henry Wood,

J. O. Birmingham, Charles Snyder and Charles Johnston,
49 which said order and decree enjoined the Rickey Land and Cattle Company, a corporation, from prosecuting two certain actions in the Superior Court of Mono County, State of California, as against the said Complainants, and said Rickey Land and Cattle Company, a corporation, says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. The Court erred in making said order and decree appealed from in this, that the cross-complaints, and each of them, of the said complainants, wherein the said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the right of said cross-complainants, to the use of the water of Walker River, as between said cross-complainants, and the Rickey Land and Cattle Company, a corporation, and T. B. Rickey, the predecessor in interest of the said Rickey Land and Cattle Company, upon which said cross-complaints said order and decree was predicated, was not a proper cross-complaint in the action in which the same were filed as against T. B. Rickey, or as against his successor in interest, said Rickey Land and Cattle Company, because the said rights sought to be determined between each of the said cross-complainants, in said cross-complaints, as against T. B. Rickey and his successor, the said Rickey Land and Cattle
50 Company, a corporation, were in no manner defensive to the main action of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, nor was the determination of the controversy sought to be made by said cross-complaints between said cross-complainants and said T. B. Rickey, or his successor in interest, said Rickey Land and Cattle Company, necessary in order that either of the said cross-complainants might make a full and complete defense of all rights of said cross-complainants in the said cause of Miller & Lux vs. T. B. Rickey, and said cross-complainants and others.

Second. The Court erred in making said order and decree appealed from in this, that the cross-complaints of the complainants herein, filed by them in the action of Miller & Lux vs. T. B. Rickey and said cross-complainants, and others, wherein the said cross-complainants, herein, sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the rights to the use of the water of Walker River, between said cross-complainants and T. B. Rickey and the Rickey Land and Cattle Company, upon which said cross-complaints said order and decree appealed from was predicated, was not a proper cross-complaint in said action of Miller & Lux, vs. T. B. Rickey and others, because the said controversy made between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle
51 Company, was a controversy between residents of the same State, to wit, residents of the State of Nevada, and the said controversy and the determination of said controversy between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle Company, was in no way necessary or pertinent to the full determination of the defense of either of

the said cross-complainants in said suit of Miller & Lux vs. T. B. Rickey and said cross-complainant and others, and neither of the said cross-complaints was in any manner ancillary to said suit of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, had no jurisdiction to determine the controversy sought to be made by each of said cross-complainants between said cross-complainants and said T. B. Rickey, or his successor in interest, the said Rickey Land and Cattle Company, all of whom were residents of the State of Nevada.

Third. That each of said cross-complaints filed by said complainants herein in the action of Miller & Lux vs. T. B. Rickey and others, in so far as it makes a party thereto the Rickey Land and Cattle Company, was not a proper cross-complaint in the action of Miller & Lux vs. T. B. Rickey and the said cross-complainants and others, because each of said cross-complaints introduces
52 a new party to said action, to wit, the Rickey Land and Cattle Company, and said order and decree appealed from predicated upon said cross-complaints was error.

Fourth. That the jurisdiction of the Superior Court of Mono County had attached to all the defendants in said actions in Mono County by the service of summons in said actions upon all the defendants therein, including the complainants herein, before the writs of subpœna ad respondendum, issued out of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, upon and pursuant to the prayers in each cross-complaint filed by the complainants herein in said action of Miller & Lux vs. T. B. Rickey and others, had been served, so that the Superior Court of Mono County acquired jurisdiction to quiet the title of said Rickey Land and Cattle Company to the use of the waters of the Walker River in the State of California, before the said Circuit Court of the United States, Ninth Circuit, District of Nevada, acquired any jurisdiction of the defendant Rickey Land and Cattle Company by reason of the filing of said cross-complaints, and it was, therefore error for the Circuit Court of the District of Nevada to make its order and decree appealed from based upon the said cross-complaints.

Fifth. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff therein, the
53 Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River in the State of California, and to procure a judgment of the Superior Court of Mono County quieting the title of the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River, and to the use of certain of the waters of the Walker River in the State of California, as against the said complainants herein, and others, and the said action of Miller & Lux vs. T. B. Rickey and others in the Circuit Court of the United States, Ninth Circuit, District of Nevada, was brought to enjoin T. B. Rickey and the said complainants herein from diverting the waters of said Walker River, and the said Circuit Court erred in making the decree herein appealed from, be-

cause no proceeding which ha' been taken, nor any proceeding which might be taken, nor any judgment which might be rendered in the Superior Court of Mono County in said actions commenced and prosecuted therein, could in any manner, way or form, impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, nor could the same in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth
54 Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, so far as either of the said complainants herein had a right to invoke the powers of the said Circuit Court of the United States, Ninth Circuit of the District of Nevada.

Sixth. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff herein, the Rickey Land and Cattle Company, a corporation, to certain waters and the use of certain waters of the Walker River in the State of California, and to procure judgment of the Superior Court of said Mono County quieting the title of the Rickey Land and Cattle Company as against the said complainants herein and others, and the said action of Miller & Lux vs. T. B. Rickey and others, including complainants herein, in the Circuit Court of the United States, Ninth Circuit, District of Nevada, was brought to enjoin T. B. Rickey and others, including complainants herein, from diverting the waters of said Walker River, and the interlocutory order and decree herein appealed from was rendered in a proceeding claimed to be ancillary to said action of Miller & Lux vs. T. B. Rickey and others, because said Rickey Land and Cattle Company was not a party to said action of Miller & Lux vs. T. B. Rickey et al., and would not be bound by the judgment or decree rendered therein, and the said
55 Circuit Court of the United States, Ninth Circuit, District of Nevada, erred therefore in restraining the Rickey Land and Cattle Company from prosecuting said actions in said Mono County.

Seventh. That the said Circuit Court, Ninth Circuit, District of Nevada, had no jurisdiction to try and determine the rights to the use by T. B. Rickey of the waters of Walker River in the State of California, nor the title of T. B. Rickey to the waters of Walker River in the State of California, nor the use by the Rickey Land and Cattle Company, a corporation, of the waters of the Walker River in the State of California, nor the title of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California, in said action of Miller & Lux vs. T. B. Rickey et al., and therefore had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of T. B. Rickey, to the use of said water and the right to the use of said water, because the water was in the State of California, and the use of said water and the diversion of said water was made by said T. B. Rickey and by the said Rickey Land and Cattle Company, his successor, in the State of California,

and the said water and the land upon which the use of the said water was made was all in the State of California and not in the State of Nevada, and the said Circuit Court of the United
56 States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of said Rickey Land and Cattle Company to the use of the water of the Walker River or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River as the successor of T. B. Rickey, and the said Court erred therefore in rendering the said order and decree restraining appellant from prosecuting said actions in Mono County.

Eighth. That the Court had no jurisdiction to render said order and decree appealed from as against the appellant, Rickey Land and Cattle Company.

Ninth. That it was error for the said Circuit Court of the District of Nevada to make and render said order and decree appealed from.

Tenth. That the said complaint upon which said interlocutory order and decree appealed from was granted does not state facts sufficient to entitle the complainants therein to the said interlocutory order and decree.

Eleventh. That before the cross-complaints filed by the complainants in the action of Miller & Lux vs. T. B. Rickey and others, including complainants, the Rickey Land and Cattle Company, a corporation, was the owner of all the right, title and interest of, in and to the waters of the Walker River, and in and to the use of the waters of the Walker River which the Rickey Land and
57 Cattle Company have since been entitled to and owned, and at the time that the said Rickey Land and Cattle Company acquired its rights and ownership of the said waters of the Walker River and the use of the said waters of the Walker River, there was no proceeding or proceedings in the Circuit Court of the United States, Ninth Circuit, District of Nevada, commenced by or on behalf of said complainants, or either of them, affecting or involving the title of said T. B. Rickey, the grantor of the Rickey Land and Cattle Company, thereto, and the said Rickey Land and Cattle Company was not a party to the suit of Miller & Lux vs. T. B. Rickey and others, including said complainants; therefore the court erred in enjoining and restraining the prosecution of said suit in Mono County by said interlocutory order and decree appealed from.

In the action of Miller & Lux, a corporation, vs. T. B. Rickey and others, commenced in the Circuit Court of the United States, Ninth Circuit, for the District of Nevada, the Pacific Livestock Company, a corporation, was substituted as complainant, and whenever said action is referred to herein it is intended to include the said action as the same is now pending, with said substituted complainant.

Wherefore, the appellant, the Rickey Land and Cattle Company, prays that the decree of said Circuit Court of the United
58 States, Ninth Circuit, for the District of Nevada, be reversed and the said Circuit Court of the United States, Ninth Circuit, for the District of Nevada, be ordered to enter an order and

decree dissolving the injunction and restraint made by the said order and decree appealed from.

RICKEY LAND AND CATTLE CO. INC.
[SEAL.] By T. B. RICKEY, *President,*
Defendant and Appellant.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for said Corporation Appellant.

[Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Assignment of Errors. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Offices 911 Laguna St., San Francisco, Calif. Filed July 23, 1906. T. J. Edwards, Clerk.

59 In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 790.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Complainants,
vs.
THE RICKEY LAND AND CATTLE COMPANY (a Corporation), Defendant.

Order for Appeal.

It is ordered that the appeal of the Rickey Land and Cattle Company, appellant, in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory order and decree made in the above-entitled court on the 25th day of June, 1906, in the above-entitled cause, be, and the same hereby is allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

And it is further ordered that the bond on appeal be fixed
60 at the sum of five hundred dollars ($500), the same to act as a bond for costs and damages on appeal.

Dated San Francisco, Cal., July 23d, 1906.

WM. W. MORROW, *Circuit Judge.*

[Endorsed]: No. 790. In the Circuit Court of the United States for the Ninth Circuit, District of Nevada. Henry Wood et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Order for Appeal. Filed July 23, 1906, T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant. Office 911 Laguna St., San Francisco, Calif.

Bond on Appeal.

Know all men by these presents, that we, Rickey Land and Cattle Company, as principal, and S. Trask and H. C. Cutting, as sureties, are held and firmly bound unto Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, in the full and just sum of five hundred dollars, to be paid the said Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, certain attorney, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors and
61 administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of July, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Circuit Court of the United States, for the Ninth Circuit, District of Nevada, in a suit depending in said Court, between Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston as complainants and Rickey Land and Cattle Company, a corporation, as defendant, an interlocutory order and decree was rendered against the said Rickey Land and Cattle Company and the said Rickey Land and Cattle Company, a corporation, having obtained from said Court an order allowing it to appeal to reverse the said order and decree in the aforesaid suit, and a citation directed to the said Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Rickey Land and Cattle Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

RICKEY LAND AND CATTLE CO., INC., [SEAL.]
By T. B. RICKEY, *President.*
S. TRASK. [SEAL.]
H. C. CUTTING. [SEAL.]

62 Acknowledged before me the day and year first above written.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA.
District of Nevada, ss:

S. Trask and H. C. Cutting, being duly sworn, each for himself, deposes and says, that — is a freeholder in said District, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

S. TRASK.
H. C. CUTTING.

Subscribed and sworn to before me this 23d day of July, A. D. 1906.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 790. United States Circuit Court, District of Nevada, for the Ninth Circuit. Henry Wood et al., Complainants, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Bond on Appeal. Form of bond and sufficiency of sureties approved. Wm. W. Morrow, Judge, Filed July 23d, 1906. T. J. Edwards, Clerk.

63 *Clerk's Certificate to Transcript.*

DISTRICT OF NEVADA, *ss:*

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing forty-two typewritten pages, numbered from 1 to 42, inclusive, are a full, true and correct copy of the record and of all proceedings in the case therein entitled; and the costs of said record are thirty dollars, which have been paid by the respondent and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Carson City, Nevada, this 25th day of August, 1906.

[SEAL.] T. J. EDWARDS, *Clerk.*

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, and to A. M. Kidd, their Solicitor, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California,
64 within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the Ninth Circuit, District of Nevada, wherein the Rickey Land and Cattle Company (a corporation), is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, United States Circuit Judge for the Ninth Circuit, this 23d day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

Received copy of the within citation this 27th day of July, 1906.

A. M. KIDD,
Per ISAAC FROHMAN,
Solicitor for Appellee.

[Endorsed:] No. 790. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. Henry Wood et al., Complainant, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Citation on Appeal. Filed July 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

65 [Endorsed:] No. 1365. United States Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Company, a Corporation, Appellant, vs. Henry Wood, James E. Birmingham, Charles Snyder, and Charles Johnston, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Nevada.

Filed August 29, 1906.

F. D. MONCKTON, *Clerk.*

66 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-five (65) pages, numbered from one (1) to sixty-five (65), inclusive, to be a true copy of the printed Transcript of Record in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules and practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22d day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

67 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Appellees.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

ADDENDA.

Upon Appeal from the United States Circuit Court for the District of Nevada.

68 At a stated term, to wit, the October term, A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Wednesday, the thirty-first day of October, in the year of our Lord one thousand nine hundred and six. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolverton, District Judge.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Order of Submission.

Ordered, appeal argued by Mr. James F. Peck, counsel for the appellant, and Mr. W. B. Treadwell, counsel for the appellees, and submitted to the Court for consideration and decision, with leave to counsel for the appellant to file a reply brief within fifteen (15) days.

69 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Upon Appeal from the United States Circuit Court for the District of Nevada.

Opinion of U. S. Circuit Court of Appeals.

The facts of this case differ from those upon which the case of Rickey Land and Cattle Company vs. Miller & Lux, just decided, proceeded, only in that, in the original suit of Miller & Lux vs. Rickey et al., the present appellees, being codefendants with Rickey in that suit, filed cross-bills therein, whereby they claimed to be entitled to certain appropriations of water from Walker River, for use upon their lands—the diversions being made and the lands being situated in the State of Nevada; and it was alleged that Rickey had been and was then diverting the water from the stream above, which deprived the cross-complainants of the amount to
70 which they were entitled under their appropriations. Such cross-bills were filed December 20, 1904, and writs of subpœna were issued thereon, and served upon Rickey the same day. And it is further shown that the summons issued in the causes instituted in the Superior Court of Mono County, California, were served upon appellees December 26, 1904. The appellees obtained, after notice and hearing, an order of court temporarily restraining the appellant from making any diversions of water from Walker River to their detriment, from which order this appeal is prosecuted.

James F. Peck and Charles C. Boynton, for Appellant.
W. C. Van Fleet and W. B. Treadwell (Frohman & Jacobs and Frank H. Short, of Counsel), for Appellees.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

WOLVERTON, District Judge delivered the opinion of the Court.

The single question urged here, in addition to those determined in the case of Rickey Land and Cattle Company vs. Miller & Lux, is whether the appellees have a standing in court whereby to maintain their cross-bills as against appellant. The appellant and the
71 appellees are all codefendants in the cause of Miller & Lux vs. Rickey et al., and all citizens of the State of Nevada; and, in their cross-bills, it will be seen, the appellees do not dispute the right of diversion by Miller & Lux, nor clai mthat its diversions are in any way subordinate to theirs; but they do allege that the appropriations of Rickey, whatever they may be, are subject and subordi-

nate to theirs, and pray that the Rickey Land and Cattle Company may be enjoined from diverting the waters of Walker River in any manner to their detriment or injury.

The nature and purpose of a cross-bill in equity have been clearly determined. Says Mr. Justice Nelson, in Ayres vs. Carver, 17 Howard, 591, 595:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke, that both the
72 original and cross-bill constitute but one suit, so intimately are they connected together."

To the same purpose is Ex parte Railroad Co., 95 U. S. 221, 225, where it is said:

"A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the Court, so that there may be a complete decree touching the subject-matter of the action."

So Sanborn, Circuit Judge, says in Stuart vs. Hayden, 72 Fed. 402, 410:

"A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an origi-
73 nal bill, and must be dismissed, because there cannot be two original bills in the same case.

Cross vs. De Valle, 1 Wall. 1.
Rubber Co. vs. Goodyear, 9 Wall. 807.
Young vs. Colt, 2 Blatch. 373.
Stonemetz Printers' Mach. Co. vs. Brown Folding Mach. Co., 46 Fed. 851.

Counsel for appellant expressly admit that if the cross-bills are ancillary in purpose and character, they should be entertained regardless of the citizenship of the parties defendant. This reduces the inquiry simply to whether such cross-bills are, in legal contemplation, ancillary to the original bill, or whether they introduce matter foreign to, and disconnected with, the subject-matter of the original suit.

In the light of the foregoing authorities, it may well be premised that, if the cross-bills operate defensively in behalf of the appellees in some substantial way, then they are pertinent and afford appellees a standing whereby to assert such rights as will protect them against the suit of complainant in such cause; and this although they might impinge upon the alleged rights of the appellant. A suit respecting water appropriations from a stream is sui generis, and it may, and does frequently, happen that, in order fully
74 to protect the rights of one appropriator against those of another, it is necessary to determine also the rights of the former, not only with reference to those of that other, but also with reference to those of still others upon the same stream. We can adduce no better illustration than that suggested by counsel for appellees. Suppose that A, B and C are appropriators of 10 cubic feet of water each from the same stream, within which is running but 30 cubic feet. A, the lower appropriator, sues, and procures a decree and injunction against B and C, from diverting more water than will allow A's 10 cubic feet to come down to him. B might divert 20 feet, and C but 10, the amount only to which the latter is entitled, and yet both B and C would be guilty of a violation of the injunctive decree, because A has been deprived of his 10 feet of water. Now, does it not seem perfectly clear that, if C had set up, by cross-bill to A's original bill, his interest in the stream, the decree would have been different, and would have gone against B and C severally, and not jointly, so that a violation of the injunction by B would not have been also a violation by C, who was innocent of any wrong? Is there not here matter for substantial defense, to sustain such a cross-bill? The answer is obvious. The cross-bill in such a case would be germane to the subject matter of the original bill, and would operate defensively in behalf of the defendant inter-
75 posing it. So it would be a matter of defense for C to have his appropriation fixed as against B. The identical question has received careful consideration in the case of Ames Realty Co. vs. Big Indian Mining Co., 146 Fed. 166, at the hands of Hunt, District Judge, whose reasoning is so able, lucid, and cogent as to scarcely admit of any further controversy. He concludes, after making apt illustration of the case in hand, as follows:

"Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction over the case between complainant and first defendant, and, having jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the questions in the affirmative. It is true that if complainant can secure protection of its own right, junior appropriators might be left to fight out their relative rights among themselves; but, as conditions frequently exist in litigation over usufruct of water, where it is practically impossible to make a just decree between complainant and one defendant without ascertaining rights of defendants as against one another, the Court will permit cross-complaints to stand, to the end that a multiplicity of suits may be avoided, so that tedious, expensive, and unnecessary litigation may be saved."

76 In Union Mill & Mining Co. vs. Dangberg, 81 Fed. 73, as against the objection that the defendants, of whom there were about 125, were not all jointly interested in their appropriations to the injury of complainant, and therefore should not have been made parties, Judge Hawley has this to say:

"These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of
77 which it complains. Everyone who contributes to such injury is properly made a party respondent."

The reason is cogent in demonstration of the interdependent relations that exist among different appropriators from the same stream, and of the condition that one appropriator cannot always be fully protected against the injunctive process of another, unless at the same time he has his own rights ascertained and determined with relation to still others who are also subject to the same process. And so we conclude that the order appealed from should be affirmed, and it is so ordered.

[Endorsed]: 1365. U. S. Circuit Court of Appeals for the Ninth Circuit. The Rickey Land and Cattle Co. vs. Henry Wood et al. Opinion. Filed March 4, 1907. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Appellees.

78 *Decree of U. S. Circuit Court of Appeals.*

Appeal from the Circuit Court of the United States for the District of Nevada.

This cause came — to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order or decree of the said Circuit Court appealed from in this cause be, and the same is hereby affirmed, with costs.

[Endorsed]: Decree. Filed and entered March 4, 1907. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court-room, in the city and county of San Francisco, on Monday, the twentieth day of May, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

79 No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

Order Denying Petition for Rehearing, etc.

Ordered, petition for a rehearing, heretofore filed herein, denied.

Upon motion of Mr. Charles C. Boynton, counsel for the appellant, ordered, issuance of mandate of this Court in the above-entitled cause stayed for the period of ten (10) days from date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY (a Corporation), Appellant,
vs.
HENRY WOOD ET AL., Appellees.

80 *Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fourteen (14) pages, numbered from one (1) to fourteen (14), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 22 day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rickey Land and Cattle Company is appellant, and Henry Wood, James E. Birmingham, Charles Snyder, and Charles Johnston are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Nevada, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
82 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,056. Supreme Court of the United States. No. 653, October Term, 1907. Rickey Land & Cattle Co., vs. Henry Wood et al. Docketed No. 1365. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

83 United States Circuit Court of Appeals for the Ninth Circuit.

RICKEY LAND AND CATTLE COMPANY, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Appellees.

On Appeal from the Circuit Court of the United States for the District of Nevada.

Stipulation.

Whereas the Supreme Court of the United States has heretofore duly issued its writ of certiorari directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit directing said Judges to send without delay to the said Supreme Court of the United States the record and proceedings in the above entitled cause:

Now, therefore, it is hereby stipulated by and between the attorneys of record for the respective parties above-named that the certified transcript of record heretofore filed in the Supreme Court of the United States in connection with and in support of the petition for said writ of certiorari, the same being docketed as No. 653 of October Term, 1907, shall be taken and considered as the transcript of the record and proceedings remaining in the Circuit Court of Appeals for the Ninth Circuit as though the same had been returned in obedience to said writ of certiorari.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Appellant.
W. B. TREADWELL,
Attorney for Appellees.

FRANK H. SHORT,
FROHMAN & JACOBS.
Of Counsel for Appellees.

84 (Endorsed:) Docketed. No. 1365. United States Circuit Court of Appeals, Ninth Circuit. Rickey Land & Cattle Co., Appellant, vs. Henry Wood, James E. Birmingham, Charles Snyder and Charles Johnston, Appellees. Stipulation as to Return to Writ of Certiorari. Filed Mar. 25, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Chas. C. Boynton, Attorney at Law, 1064 Mills Bldg., San Francisco, Cal.

85 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Appellees.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next two preceding pages, numbered one (1) and two (2), to be a true copy of a "Stipulation as to Return to Writ of Certiorari" filed in the above-entitled cause on the twenty-fifth day of March, A. D. 1908, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

86 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1365.

RICKEY LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
HENRY WOOD, JAMES E. BIRMINGHAM, CHARLES SNYDER, and CHARLES JOHNSTON, Appellees.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ of a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 2nd day of April, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] 653/21056.

87 [Endorsed:] File No. 21,056. Supreme Court U. S. October Term, 1909. Term No. *653*. 94. Rickey Land & Cattle Co., Petitioner, vs. Henry Wood et al. Writ of Certiorari & return. Filed May 18th, 1908.

No. 632, 633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON,
Respondents.

MOTION FOR WRIT OF CERTIORARI AND NOTICE OF MOTION.

F. D. McKENNEY.
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

PRESS OF THE JAMES H. BARRY CO.
513-514 LEAVENWORTH ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

Rickey Land and Cattle Company (A CORPORATION),

Petitioner,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER AND CHARLES JOHNSTON,

Respondents.

MOTION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Comes now the Rickey Land & Cattle Co., a corporation, by its counsel appearing in that behalf, and moves this Honorable Court that it shall, by certiorari, or other proper process, directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said

Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the respondents, Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, were appellees, and your petitioner, Rickey Land & Cattle Co., was appellant, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

.....F. D. McKENNEY.....

Counsel for said Petitioner for the purpose of this motion.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

RICKEY LAND & CATTLE CO. (A CORPORATION),
Appellant,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER AND CHARLES JOHNSTON,
Respondents.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

To ~~Miller & Lux, a corporation~~, Appellee, and to W. B. Treadwell, Frank H. Short, and Frohman & Jacobs, its counsel:

Please take notice that on Monday, the 2nd day of March, 1908, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that the Rickey Land & Cattle Company, a

corporation, appellant, will, upon its verified petition and a copy of the entire record in this cause, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room, at the Capitol in the City of Washington, D. C. F. D. McKENNEY.

JAMES F. PECK,
CHARLES C. BOYNTON,
Solicitors for Appellant.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for a writ of certiorari and brief in support of petition are hereby acknowledged, and it is hereby stipulated and agreed that the said motion may be submitted to the Court on Monday, the 2nd day of March, 1908.

W. B. TREADWELL,
FRANK H. SHORT,
FROHMAN & JACOBS,

Solicitors for Henry Wood, James O. Birmingham, Charles Snyder and Charles Johnston, Appellees.

No. 658. 3[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

RICKEY LAND AND CATTLE COMPANY
(a Corporation),

Petitioner,

vs

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON,

Respondents.

Petition for Writ of Certiorari.

F. D. McKENNEY,
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

PRESS OF THE JAMES H. BARRY CO.
213-214 LEAVENWORTH ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER AND CHARLES JOHNSTON,
Respondents.

No. ——

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Rickey Land and Cattle Company, a Corporation, respectfully shows to this Honorable Court as follows:

I.

That the Rickey Land and Cattle Company is now, and ever since the 6th day of August, 1902, has been, a corporation created, existing, and acting under the laws of the State of Nevada and having its principal

place of business at Carson City, in the State of Nevada.

That Miller & Lux is now, and ever since the time prior to 1900 has been, a corporation created, existing, and acting under and by virtue of the laws of the State of California.

II.

That on the 10th day of June, 1902, a bill of complaint was filed in the Circuit Court of the United States for the District of Nevada by said Miller & Lux, against 137 defendants, including Thomas B. Rickey, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, to enjoin each of them from diverting the water of the Walker River. It was alleged in said complaint that each of said defendants was diverting water from the Walker River under a claim of right so to do, and were so diverting the said water at a place above the place on said river where said complainant, Miller & Lux, had a right to divert and had diverted said water from said river.

Complainant, Miller & Lux, in the suit so commenced on the 10th day of June, 1902, alleged that it was, and that it and its predecessors in interest, had been for many years the owner of certain lands situate in the State of Nevada, through and over which the said Walker River in its course flowed, and that it and its predecessors had for many years

diverted the water from the said Walker River and used the same for the irrigation of the said lands so owned by Miller & Lux, complainant, and alleged that the said diversions of water so made by said Miller & Lux were made prior to the diversions of water or any of them by the defendants in said suit, and Miller & Lux alleged that it and its predecessors had diverted from the said Walker River, as aforesaid, the flow of 943 29/100 cubic feet of water per second and claimed a prior right as against all the defendants to continue to divert the said quantity of water from the said river.

That the subpœna ad respondendum was issued and served upon all the defendants in the action so commenced by said complainant on the 10th day of June, 1902.

III.

That defendant, Thomas B. Rickey, in the action so commenced by Miller & Lux on the 10th day of June, 1902, filed his plea to the jurisdiction of the United States Circuit Court for the district of Nevada, and said Thomas B. Rickey in said plea alleged that the said Walker River was a natural watercourse, arising in and flowing through the eastern part of the State of California into and through the western part of the State of Nevada, and further alleged in said plea that all diversions of water made by said Thos. B. Rickey from the said Walker River

were made in the State of California and were used for the irrigation of lands owned by the said Thomas B. Rickey in the State of California, and said Thomas B. Rickey in said plea disclaimed any right or claim of right to divert any of the waters of the Walker River in the State of Nevada; and the said Thomas B. Rickey, because of said facts stated in said plea, pleaded that the said United States Circuit Court for the District of Nevada had no jurisdiction in said action commenced by Miller & Lux on the 10th day of June, 1902, to enjoin a diversion of the water by said Thomas B. Rickey in the State of California.

That said plea was argued, submitted, and overruled by the Court. See Opinion of the Court in *Miller & Lux* vs. *Rickey et al,* 127 Federal Report, 573.

IV.

On the 6th day of August, 1902, Thomas B. Rickey and others organized the corporation, the Rickey Land and Cattle Company, petitioner herein, and on the said 6th day of August, 1902, after the organization of the said corporation, the said Thomas B. Rickey transferred and conveyed, by deeds of conveyance properly executed and acknowledged, to said corporation all the lands and water rights and rights to the use of water of said Thomas B. Rickey in the State of California, including the water and

rights to the use of water of the Walker River in the State of California.

V.

That the said Walker River is, and from time immorial has been, a natural stream and water-course with well defined bed and banks, having its source in two branches known as the East Fork of the Walker River and the West Fork of the Walker River, and both of said branches have their source in, and flow for a long distance through, the eastern part of the State of California, into and through, for a long distance, the western part of the State of Nevada, where they unite, forming the main Walker River in the State of Nevada.

That the alleged diversions of water from the said Walker River by said complainant, Miller & Lux, are made below the junction of the said two branches of the said Walker River.

That the said Walker River in its course, in the State of California, flows through the lands so conveyed by the said Thomas B. Rickey to the said Rickey Land and Cattle Company, which said lands form the bed and banks of the said Walker River in the State of California.

VI.

That on the 15th day of October, 1904, the Rickey Land and Cattle Company, the petitioner herein,

commenced an action in the Superior Court, County of Mono, State of California, against 166 defendants, including Miller & Lux, the complainant in said action commenced in the Circuit Court of the United States for the district of Nevada, and including Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnson, by filing a complaint; in which complaint the said Rickey Land and Cattle Company alleged that it was the owner in possession and entitled to the possession of certain lands in the State of California, which lands were the same lands conveyed to it by the said Thomas B. Rickey, as aforesaid, and further alleged that the said lands constituted one entire, continuous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of the said Walker River, called the West Fork of the Walker River, and further alleged that said lands and all thereof are, and from time immemorial have been riparian to said West Fork of said Walker River and situate along and bordering upon said West Fork of said Walker River, and further alleged that the said Rickey Land and Cattle Company was the owner in the possession of and entitled to the possession, use, and enjoyment of, and that it has the right to divert and appropriate, and for many years has diverted and appropriated and used, all the water of the said West Fork of the Walker River and its tributaries in the State of California to the extent

of a constant flow of 1575 cubic feet of water per second, for use upon the said lands in the State of California riparian to said West Fork of the said Walker River, and further alleged in said complaint so filed in the Superior Court of Mono County that each of the defendants in said action, including said Miller & Lux, Henry Wood, J. O. Birmingham, Charles Snyder and Charles Johnston, claim some right, title, and interest adverse to the said Rickey Land and Cattle Company in and to said constant flow of 1575 cubic feet of water per second, or some part or portion thereof in the State of California, and that said right, title, and interest so claimed by each of said defendants, including said Miller & Lux, in and to said water, is without right, and that all claims of said defendants, and of each of them, to the waters of the said West Fork of the said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company and to its right to divert and appropriate and use from the said West Fork of the said Walker River in the State of California a constant flow of 1575 cubic feet of water per second for use upon its said lands riparian to said West Fork of the said Walker River in the State of California, and the said Rickey Land and Cattle Company, in said complaint, filed in said Superior Court of Mono County prayed that said Superior Court of Mono County, California, should adjudge that the said

Rickey Land and Cattle Company is the owner in the possession, use, and enjoyment, and is entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said West Fork of said Walker River in the State of California to the extent of a constant flow of 1575 cubic feet of water per second for use on its said lands riparian to the West Fork of the said Walker River in the State of California, and therein further prayed that the Court adjudge that neither of the defendants therein, including Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, has any right, title, and interest, claim or estate in or to any of the waters flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than 1575 cubic feet of water per second, and that it be further adjudged that the said defendants, and each of them, be estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors, or assigns, any right, title, or interest, claim or estate, in or to any of the waters now flowing, or which may hereafter flow, in said West Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than 1575 cubic feet of water per second.

VII.

That on the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner herein, commenced an action in the Superior Court, County of Mono, State of California, against one hundred and fifty-two defendants, including said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, by filing a complaint, in which complaint the said Rickey Land and Cattle Company alleged that it was the owner in possession, and entitled to the possession, of certain lands in the State of California, which lands were the same lands conveyed to it by the said Thomas B. Rickey, as aforesaid, and further alleged that the said lands constitute one entire continuous body of land, over, through, and upon which flows, and from time immemorial has flowed, a certain branch or tributary of the said Walker River, called the East Fork of the Walker River, and further alleged that said lands and all thereof are, and from time immemorial have been, riparian to the East Fork of the said Walker River, situate, along, and bordering on said East Fork of the said Walker River, and further alleged that the said Rickey Land and Cattle Company was the owner in the possession of, and entitled to the possession, use, and enjoyment of, and that it has the right to divert and appropriate, and for many years has diverted and appropriated and used all the water

of said East Fork of the said Walker River and its tributaries, in the State of California, to the extent of a constant flow of 504 cubic feet of water per second, for use upon lands in the State of California riparian to said East Fork of the said Walker River, and further alleged in said complaint so filed in the Superior Court of Mono County, that each of the defendants in said action, including the said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, claims some right, title, and interest adverse to the said Rickey Land and Cattle Company in and to said constant flow of 504 cubic feet of water per second, or some part or portion thereof, in the State of California, and that said right, title, and interest so claimed by each of said defendants, including the said Miller & Lux, Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, in and to said waters is without right, and that all claims of the said defendants and each of them to the waters of the said East Fork of the said Walker River are subordinate and subject to the said alleged ownership of the said Rickey Land and Cattle Company and to its right to divert and appropriate and use, from the said East Fork of the said Walker River in the State of California, a constant flow of 504 cubic feet of water per second for use upon its said lands riparian to said East Fork of the said Walker River in the State of California, and the said Rickey Land and Cattle Company in said

complaint, filed in said Superior Court of Mono County, prayed that said Superior Court of Mono County, California, should adjudge that the said Rickey Land and Cattle Company is the owner in the possession, use, and enjoyment, and entitled to the possession, use, and enjoyment of, and has the right to appropriate and divert all the waters of the said East Fork of the said Walker River in the State of California to the extent of a constant flow of 504 cubic feet of water per second for use on its said lands riparian to the East Fork of the said Walker River in the State of California, and therein further prayed that the Court adjudge that neither of the defendants therein, including said Miller & Lux, James O. Birmingham, Henry Wood, Chas. Snyder, and Chas. Johnston, has any right, title, or interest, claim or estate in or to any of the waters flowing, or which may hereafter flow, in said East Fork of the said Walker River in the State of California when the quantity of water then flowing is less than 504 cubic feet of water per second, and further therein prayed that it be adjudged that each of said defendants be estopped to claim or assert against the Rickey Land and Cattle Company, its grantees, successors, or assigns, any right, title, or interest, claim or estate in or to any of the waters, or the use thereof, which are now flowing, or which may hereafter flow in said East Fork of the said Walker River in said State of California when the quantity of water there-

in flowing is less than 504 cubic feet of water per second.

VIII.

That on the 20th day of December, 1904, the said Henry Wood, James O. Birmingham, and Chas. Snyder, filed in the United States Circuit Court for the district of Nevada in the said suit so originally brought by the said Miller & Lux against the said Thomas B. Rickey and others, their cross-bill; that by said cross-bill the said cross complainants alleged, among other things, that they were, and for a long time prior thereto, had been the owners of certain rights in the waters and to the use thereof of the said Walker River and certain appropriations made by them, their grantors, and predecessors in interest, and further alleged that, within three years next before the filing of said cross-bill, said Thomas B. Rickey had diverted the waters of the said Walker River, at divers places on said river above the lands of said cross complainants and above the point at which said cross complainants so diverted the same, and that a large portion of the waters so diverted by the said Thomas B. Rickey are never returned to the said river, and that he is continuing the diversions aforesaid and thereby has deprived and is depriving the said cross complainants of a large portion of said water to which they are so entitled. That it is further alleged in said cross-bill that each of the

said diversions so made by the said Thomas B. Rickey is without right, but that said Thomas B. Rickey has so diverted the said water and is diverting the same under claim of right so to do and adversely to said cross complainants, and the said cross complainants, in this paragraph mentioned, prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River above the points where the said cross complainants in this paragraph mentioned so divert the same, in such manner or to such extent as to deprive said cross complainants in this paragraph mentioned of any of the water so claimed by said cross complainants.

IX.

That on the 20th day of December, 1904, the said Chas. Johnston filed in the Circuit Court of the United States for the district of Nevada, in the said suit so originally brought by the said Miller & Lux against the said Thomas B. Rickey and others, his cross-bill, in and by which cross-bill the said cross complainant alleged, among other things, that he was, and for a long time prior thereto, had been, the owner of certain rights in the waters and to the use thereof of the said Walker River and certain appropriations therein made by him, his grantors and predecessors in interest, and further alleged that within three years next before the filing of said cross-

bill the said Thomas B. Rickey had diverted the water of the said Walker River in divers places on the said river above the lands of said cross-complainant and above the point at which said cross-complainant so diverted the same. That a large proportion of said water so diverted by said Thomas B. Rickey is never returned to the said river and that the said Thomas B. Rickey is continuing the diversions aforesaid and has thereby deprived and is depriving the said cross-complainant of a large proportion of the water to which the cross-complainant is entitled, and further in said cross-complaint alleged that each of said diversions so made by the said Thomas B. Rickey is without right and that he has so diverted said water and is so diverting the same under claim of right so to do and adversely to said cross-complainant, and therein and thereby the said cross-complainant prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from the said Walker River above the points where the said cross-complainant so diverted the same in such a manner or to such extent as to deprive said cross-complainant of any of the water so claimed by said cross-complainant.

X.

That on the 20th day of December, 1904, the Circuit Court of the United States for the district of

Nevada issued its writs of subpœna in said cross-suit upon said cross-bills directed to the said Thomas B. Rickey, and thereafter on the said 20th day of December, 1904, the said writs of subpœna were duly served by the marshal of the district of Nevada upon the said Thomas B. Rickey.

XI.

That on the 4th day of January, 1905, the said cross-complainants, Henry Wood, James O. Birmingham, Charles Snyder and Chas. Johnson, commenced this action in the Circuit Court of the United States for the district of Nevada as an ancillary proceeding and action to the said cross-complaints in said original action of *Miller & Lux* vs. *Thomas B. Rickey et al,* to restrain the Rickey Land and Cattle Company from prosecuting the two actions so commenced by the said Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, alleging, in the complaint in said ancillary action, that said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston were citizens of the State of Nevada, that the Rickey Land and Cattle Company was a corporation organized and existing under the laws of the State of Nevada and has its principal place of business at Carson City, in the County of Ormsby, in the State of Nevada, and is a citizen of the State of Nevada, and further alleged that the necessary effect of the

said actions so commenced in the Superior Court of Mono County, was to bring on, for trial and determination in said Superior Court of the State of California, the same issues presented by the said cross-complaints aforesaid, so far as relates to the issues therein between the said cross-complainants and the said Thomas B. Rickey, and further alleged that the purpose of said actions commenced in Mono County was to obtain from the said Superior Court of the State of California a judgment determining said issues in advance of the determination of the same by the United States Circuit Court for the district of Nevada, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada in the said suit, to try and determine said issues made by the said cross-complaints, and hinder and embarrass said Circuit Court for the district of Nevada in the trial of the said issues made by said cross-complaints and in the enforcement of any decree which said United States Circuit Court for the district of Nevada may render upon the issues presented by said cross-complaints so pending before it; and it was further alleged in complainant's bill of complaint herein that the further prosecution of said actions, or either of them, brought by the Rickey Land and Cattle Company in Mono County would be in derogation of the jurisdiction of the United States Circuit Court for the district of Nevada, and of the right of the said cross-complainants; and in

said complaint herein it was prayed by the said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, that the said Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them, or either of them, be enjoined and restrained from further prosecuting, as against said cross-complainants, either of the said actions so brought by the Rickey Land and Cattle Company in the said Superior Court of the County of Mono, and from taking any further steps in said action, as against said cross-complainants.

XII.

That pursuant to the said prayer of said complaint in said ancillary action, the United States Circuit Court for the district of Nevada made its order that the said defendant, the Rickey Land and Cattle Company, a corporation, should show cause before said Court why an injunction should not issue, pending said suit, according to the prayer of the complainant in said ancillary suit. The said Rickey Land and Cattle Company, pursuant to the said order to show cause, filed affidavits in said Court and the said hearing upon said order to show cause came on regularly before the said United States Circuit Court for the district of Nevada, and on the 25th day of June, 1906, an interlocutory decree was made and entered in this case by the United States Circuit Court for the district of Nevada, wherein it was ordered, adjudged,

and decreed that the said defendant, the Rickey Land and Cattle Company, its agents, servants, and attorneys, and all persons acting in aid of them, or any of them, be, and they are hereby enjoined and restrained from further prosecuting, as against said Henry Wood, James O. Birmingham, Chas. Snyder, and Chas. Johnston, either of the two actions brought by the said Rickey Land and Cattle Company in the Superior Court of Mono County, and from taking any further steps whatever in either of the said actions, pending the final hearing and determination of this ancillary suit, and until further order of the said Court.

XIII.

That thereafter, in due and proper season, an appeal was presented by the Rickey Land and Cattle Company to the Circuit Court of Appeals for the Ninth Circuit from the said interlocutory decree, and all necessary and proper steps were taken for the prosecution of the said appeal and the hearing of the same; that in due and proper season said appeal came on to be heard, and the same was heard by the said Circuit Court of Appeals for the Ninth Circuit, and after the hearing thereof the said interlocutory decree appealed from was affirmed by the said Circuit Court of Appeals on the 4th day of March, 1907, and a decree to that effect was thereupon entered. That the said Rickey Land and Cattle Com-

pany thereafter, in due time, filed with the said Circuit Court of Appeals a petition for a re-hearing of the aforesaid appeal, which said petition for re-hearing was, on the 20th day of May, 1907, denied by the said Circuit Court of Appeals. That a true and correct transcription of the record on appeal in said case, together with a copy of the decree of the said Circuit Court of Appeals affirming the decree appealed from, and also a copy of the opinion of the said Circuit Court of Appeals rendered thereon are herewith produced and filed in this Court.

XIV.

We respectfully submit that the Circuit Court of Appeals was in error in affirming the decree of the United States Circuit for the district of Nevada for the following reasons:

1. The cross-complaints, and each of them, wherein said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, district of Nevada, the rights of said cross-complainants to the use of the water of Walker River, as between the said cross-complainants and Thomas B. Rickey, upon which said cross-complaints, said order and decree appealed from, was predicated, was not a proper cross-complaint in the original action of *Miller & Lux* vs. *Thomas B. Rickey,* or as against Thomas B. Rickey, because said rights sought to be determined between each of the

said cross-complainants in said cross-complaint as against Thomas B. Rickey, were in no manner defensive to the main action of *Miller & Lux* vs. *Thomas B. Rickey* and said cross-complainants and others, nor was the determination of the controversy sought to be made by said cross-complaints between said cross-complainants and said Thomas B. Rickey necessary in order that either of said cross-complainants might make a full and complete defense of all rights of said cross-complainants in the said cause of *Miller & Lux* vs. *Thomas B. Rickey* and said cross-complainants and others.

2. The cross-complaints of the complainants herein filed by them in the action of *Miller & Lux* vs. *Thomas B. Rickey* and said cross-complainants and others, wherein the said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, district of Nevada, the rights to the use of the water of the Walker River between said cross-complainants and Thomas B. Rickey, upon which said cross-complaints were predicated, was not a proper cross-complaint in said action of *Miller & Lux* vs. *Thomas B. Rickey* and others, because the said controversy made between said cross-complainants and Thomas B. Rickey was a controversy between residents of the same State, to wit, residents of the State of Nevada, and the said controversy and the determination of said controversy between said cross-complainants and

Thomas B. Rickey was in no way necessary or pertinent to the full determination of the defense of either of the said cross-complainants in said suit of *Miller & Lux* vs. *Thomas B. Rickey* and said cross-complainants and others, and neither of the said cross-complaints was in any manner ancillary to said suit of *Miller & Lux* vs. *Thomas B. Rickey* and said cross-complainants and others, and the said Circuit Court of the United States, Ninth Circuit, district of Nevada, had no jurisdiction to determine the controversy sought to be made by each of said cross-complainants between said cross-complainants and said Thomas B. Rickey, all of whom are residents of the State of Nevada.

3. That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff therein, the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River in the State of California, and to procure a judgment from the Superior Court of Mono County, State of California, quieting the title of the Rickey Land and Cattle Company, a corporation, to certain waters and the use thereof of the Walker River in the State of California, as against the said plaintiffs herein and others, and the said suit of *Miller & Lux* vs. *Thomas B. Rickey* and others in the Circuit Court of the United States, Ninth Circuit, district of Nevada, was brought to enjoin Thomas B. Rickey and the said complainants herein

from diverting the waters of said Walker River, and therefore the judgment of the Circuit Court for the district of Nevada should not have been affirmed, because no proceeding which had been taken, or any proceeding which might have been taken, or any judgment which might have been rendered in the Superior Court of Mono County in said action commenced and prosecuted therein, could in any manner, way or form impair, infringe upon, or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, district of Nevada, in the said case of *Miller & Lux* vs. *Thomas B. Rickey* and others, including the complainants herein, nor could the same in any manner, way or form impair, infringe upon, or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, district of Nevada, in the said case of *Miller & Lux* vs. *Thomas B. Rickey* and others, including the plaintiffs herein, so far as either of said complainants herein had a right to invoke the powers of the said Circuit Court of the United States, Ninth Circuit, district of Nevada.

4. The Rickey Land and Cattle Company was not a party to said action of *Miller & Lux* vs. *Thomas B. Rickey,* commenced in the United States Circuit Court, Ninth Circuit, district of Nevada, and will not be bound under the doctrine of *lis pendens* by the judgment or decree rendered therein, in so far as it was the successor of Thomas B. Rickey in and

to the water, and right to the use of the water of the Walker River in the State of California, and therefore the Rickey Land and Cattle Company should not have been restrained from prosecuting the actions in Mono County, State of California, to quiet its title thereto.

5. That the said Circuit Court of the United States, Ninth Circuit, district of Nevada, had no jurisdiction to try and determine the rights to the use by Thomas B. Rickey of the waters of the Walker River in the State of California, nor the title of Thomas B. Rickey to the waters of the Walker River in the State of California, nor the use by the Rickey Land and Cattle Company, a corporation, of the waters of the Walker River in the State of California, nor the title of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California in said action of *Miller & Lux* vs. *Thomas B. Rickey et al.*, and therefore have no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of Thomas B. Rickey to the use of said water, or the right to the use of said water, because the water was in the State of California, and the use and diversion of said water was made by said Thomas B. Rickey and the said Rickey Land and Cattle Company, his successor, in the State of California, and the said water, and the land upon which the use of said water was made was all in the State of California, and not

in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, district of Nevada, has no jurisdiction to try the rights of said Rickey Land and Cattle Company to the use of the waters in the Walker River in the State of California, or the title of the Rickey Land and Cattle Company to the use of the waters in the Walker River in the State of California as the successor of Thomas B. Rickey.

The questions in this appeal involved are of great importance and concern. The water used for irrigation is consumed throughout the western portion of the United States, where irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The streams from which water is received, in many instances have their source in one State, and in the course of the stream it flows through a part of the State in which it has its source, and thence into and through another State. Along the course of such streams, throughout their length, are constructed ditches and canals, into which is diverted water for the purpose of irrigation. Some of such ditches are located in the State embracing the upper reaches of the stream, and others divert the water from such stream in the State embracing the lower reaches of the stream. The certainty of title or right to the use of the waters, and the priority of right to the use of the waters, is as essential to the prosperity of these farming neighborhoods as is the

certainty of the title to the lands upon which the water is used. There is a multitude of streams which flow in, or through, more than one State and furnish water for the irrigation of the lands bordering on, or adjacent, to the stream, and in some instances the water is taken from the stream and conveyed long distances to be applied for the irrigation of the lands. Millions of dollars are at present invested in irrigating ditches and canals, which divert water from such so-called "interstate" streams, and millions more are invested in farming enterprises dependent upon the water of such canals and ditches.

The prosperity of the entire western population of this country is directly and closely connected with the use of water for irrigation. So much so is this the case, that the distribution of the water for irrigation upon arid lands has been the subject of Congressional enactments. It is of paramount importance that the question of the jurisdiction of the Courts to determine the respective rights of the water in such interstate streams should be put at rest.

This is the first reported case in the Federal Courts, where the Circuit Court having its district in the State through which the lower reaches of the stream flow, has asserted jurisdiction to enjoin a diversion of the water in the other State through which the upper reaches of the stream flow.

It is therefore proper and important that this case receive the judgment of the Supreme Court of the

United States to determine this important question of jurisdiction.

In this particular case many of the defendants have filed separate cross-bills. These cross-bills present issues as to the priority of rights to the use of the water between the several defendants. If these cross-bills are entertained, and the issues made by the cross-bills and the original bill are tried, the constant attention of the trial Court for many months must be had, and many thousands of dollars of cost to the litigants must be expended before a decision is reached, which decision, when rendered, may be of absolutely no force because of the lack of jurisdiction in the Court.

The questions involved in this appeal are of great importance and concern. As it should finally be determined by the Court of last resort whether the jurisdiction of the United States Court in one of the States of the Federal Union is infringed and interfered with by an action begun and prosecuted in the State court of another State embracing the upper reaches of the stream, for the purpose of quieting the title to the water of such stream flowing in the latter State, for use upon lands lying in and riparian to the stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there has, prior to the commencement of the action in the State court, been

commenced a suit against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

That in each instance where the jurisdiction of the United States Circuit Court for the district of Nevada has been affirmed in this case, the judgment of the Court has been asserted upon a different ground, and in some particulars the grounds of the different decisions have been inconsistent. In this respect we call attention to the fact that on the plea to the jurisdiction in the original action the Court sustained its jurisdiction upon the ground that it had personal jurisdiction of the defendant, Thomas B. Rickey, and held that the action was of a transitory nature. The same Court, when enjoining the prosecution of the actions in Mono County, held that the action was of a local character and that the United States Circuit Court for the district of Nevada could quiet the title to water in the State of California. In the United States Circuit Court of Appeals for the Ninth Circuit the locus of the water is held to be the same as that of the land of Miller & Lux in the State of Nevada, upon the assumption that the land and all its appurtenances have the same identical location.

The questions involved in this appeal are also of great public importance and concern inasmuch as the said Henry Wood, James O. Birmingham, Chas.

Snyder, and Chas. Johnston, cross-complainants, are all residents of the same State with T. B. Rickey, the cross-defendant, and the jurisdiction of the United States Circuit Court for the district of Nevada is invoked by cross-bill to try controversies exclusively between them as to the prior right to the use of water, and that, too, while cross-complainants admit the claims to the use of the water asserted by the complainant Miller & Lux in the action, and when the cross-complainants allege their use and diversion and right to the water in the State which constitutes the district of the United States Court, and allege the use and diversion of water by the defendant, T. B. Rickey, under a claim of right so to do, in another State higher up on the same stream.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals affirming the decree of the Circuit Court of the United States, Ninth Circuit, district of Nevada, is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of, and under the seal of this Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding the said court to certify and serve to

this court on a day certain to be therein designated, and full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled the *Rickey Land and Cattle Company, a corporation, Appellant,* vs. *Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnston, Appellee, No. ....,* to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the act of Congress, entitled An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes. Approved March 3, 1891.

That your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this honorable Court. And your petitioner will ever pray.

THE RICKEY LAND AND CATTLE COMPANY,

By Thomas B. Rickey.
President.

F. D. McKENNEY.
JAMES F. PECK,
CHARLES C. BOYNTON,
Solicitors for Petitioner.

State of California,
City and County of San Francisco—ss.

Chas. C. Boynton being duly sworn, says: That he is one of the counsel for the Rickey Land and Cattle Company, a corporation, petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Chas. C. Boynton.

Subscribed and sworn to before me this 17th day of February, 1908.

My commission expires on the 12th day of April, 1909.

(seal) Flora Hall.

Notary Public in and for the City and County of San Francisco, State of California.

~~State of California,~~
~~City and County of San Francisco~~—ss.

Thomas B. Rickey, being duly sworn, states that he is the President of the above-named petitioner, The Rickey Land and Cattle Company, and as such President, has full knowledge of its business affairs,

and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Thomas B. Rickey

Subscribed and sworn to before me this 11th day of October, 1907.

C. H. Peters (seal)

Notary Public in and for the ~~City and~~ County of ~~San Francisco~~, State of ~~California~~ Nevada.

I hereby certify I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petitioner should be granted by this Honorable Court.

Chas. B. Boynton

Counsel for Rickey Land and Cattle Company.

No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Petitioner,

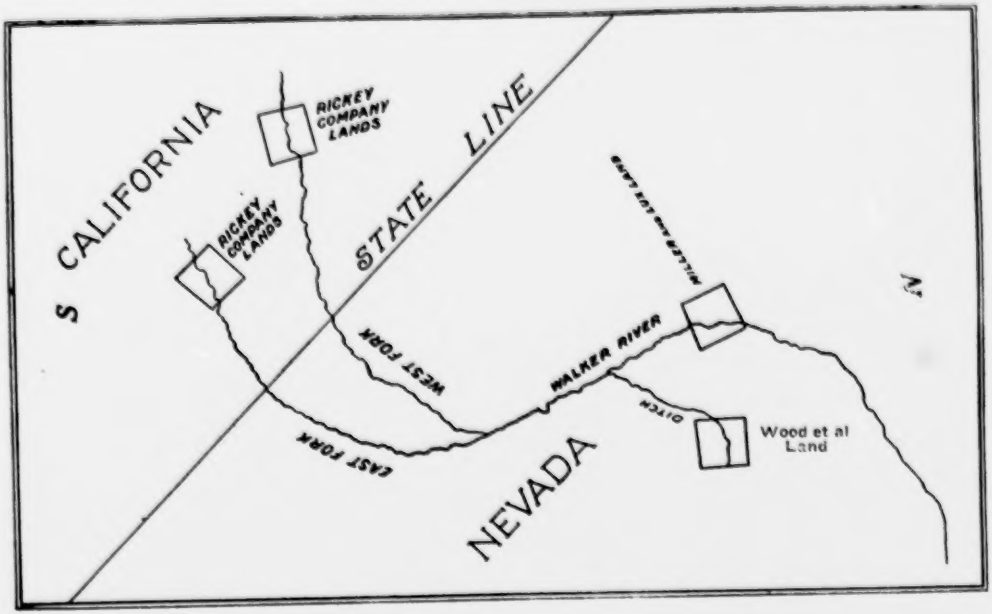
vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER and CHARLES JOHNSTON,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

F. D. McKENNEY.
JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

PRESS OF THE JAMES H. BARRY CO.
513-514 LEAVENWORTH ST.


S CALIFORNIA
STATE LINE
RICKEY COMPANY LANDS
RICKEY COMPANY LANDS
WEST FORK
EAST FORK
WALKER RIVER
DITCH
Wood et al Land
NEVADA

IN THE

Supreme Court of the United States

OCTOBER TERM

RICKEY LAND AND CATTLE COMPANY, a Corporation,
Petitioner,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER AND CHARLES JOHNSTON,
Respondents.

Brief in Support of Petition for Writ of Certiorari.

This petition is prosecuted from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the Circuit Court for prosecuting two actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the prosecution of said actions would be to bring on for trial and determination the same issues as thereafter were presented by a cross

bill filed by respondents in a certain action theretofore brought by one Miller & Lux against one T. B. Rickey in the United States Circuit Court for the district of Nevada, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Petitioner owns two tracts of land in the State of California, marked on the Plat, Rickey Company Lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Petitioner claims a right to a certain definite quantity of the waters of each branch of the said river within the State of California to irrigate its said lands (Trans., p. 8, 13).

Miller and Lux, a California corporation, owns certain lands on the main Walker River in the State of Nevada, noted on the plat as Miller & Lux Lands, and claims a right to a certain definite quantity of the waters of the said river in

the State of Nevada to irrigate said lands (Trans., p. 5).

Respondents own certain lands in the State of Nevada, marked on the plat Wood et al., lands being somewhat higher up on the stream than the lands of Miller & Lux, and claim a right to divert waters from said Walker River in the State of Nevada for the purpose of irrigating these lands (Trans., p. 14). Both petitioner and respondents herein are citizens of the State of Nevada.

On July 10, 1902, said Miller & Lux commenced an action in the United States Circuit Court for the district of Nevada against one Thomas B. Rickey and 137 other defendants, including respondents, and allege that it was the owner, by appropriation, of certain rights in the waters of the Walker River in the State of Nevada, and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of waters to which it was entitled (Trans., pp. 3 and 4).

On August 4, 1902, said defendant, T. B. Rickey, filed his plea to the jurisdiction of the said United States Circuit Court for the district of Nevada, setting up the facts that the Walker River rises in the State of California and flows therefrom into the State of Nevada, and that he owned certain lands on the said Walker River in the State of California, and claimed the right to divert water from the said Walker River in the State of California for the irri-

gation of the said lands, but disclaimed any claim of right or intention to divert any water from the said Walker River in the State of Nevada (Trans., p. 3).

Wherefore, said T. B. Rickey pleaded that the said United States Circuit Court for the district of Nevada had no jurisdiction to determine his right to appropriate and divert water from the Walker River in the State of California. His said plea was thereafter overruled (Trans., p. 3).

On the 6th day of August, 1902, said T. B. Rickey sold his said lands and water rights in the State of California to the Rickey Land and Cattle Co., a corporation, petitioner herein, which said lands are the lands designated on the plat (Trans., p. 7).

On the 15th day of October, 1904, the Rickey Land and Cattle Company, petitioner, commenced two actions in the Superior Court of Mono County, State of California, against said Miller & Lux and some three hundred other defendants, including respondents herein, wherein it alleged that it was the owner of the right to divert and appropriate certain waters of the Walker River in the State of California, and sought to quiet its title to its water rights in the said Walker River in the State of California (Trans., pp. 8-11).

Subsequent thereto and on the 20th day of December, 1904, respondents herein filed a cross bill against T. B. Rickey in the original action commenced by

Miller & Lux against T. B. Rickey et al. in the United States Circuit Court for the District of Nevada (Trans., p. 14).

Respondents alleged in said cross-bills that they owned certain rights and appropriations in the waters of Walker River, in the State of Nevada, on which rights their co-defendant, T. B. Rickey, was trespassing. Wherefore an injunction against said T. B. Rickey was prayed (Trans., p. 14).

Thereafter respondents brought this action in the United States Circuit Court for the district of Nevada to enjoin petitioner from prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the necessary effect of the two last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as were presented by the cross-bills of complaint filed by respondents in the said original action of *Miller & Lux* vs. *T. B. Rickey,* and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the United States Court under the cross-bills in the original action, and thereby defeat the jurisdiction of the United States Circuit Court for the district of Nevada (Trans., pp. 17, 18). An interlocutory order and decree restraining appellant herein from prosecuting said actions in the California court was thereafter entered (Trans., p. 64), and from such order and

decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, where said decree was affirmed.

This writ is prayed for in order to have said decree reviewed by this honorable court.

PUBLIC IMPORTANCE OF QUESTIONS INVOLVED.

Preliminary to the discussion of the grounds wherein we contend that the Court of Appeals erred in making its decree herein, we submit the following brief statement of the great public importance and concern of the questions involved in this appeal.

In irrigation of land the waters of the stream are consumed. Throughout the western portion of the United States irrigation is absolutely essential to the prosperity of the communities dependent upon agriculture. The certainty of title or right to use of the waters along the line of the stream is as essential to prosperity as is the title to the land upon which the water is used. A multitude of streams have their source in one State and in their course flow through that State into and through another State, and furnish water used for irrigation in both States along their course. Millions of dollars are invested in irrigation ditches and canals which divert water from such streams, and millions more are invested in farming enterprises dependent upon the waters of these streams and canals. The prosperity of the entire

western population is directly and closely connected with the use of water from its streams. The question of jurisdiction of the courts to determine the relative rights to water flowing in interstate streams should be put at rest.

As this is the first reported case in the United States Courts where the Circuit Court having its district in the State through which the lower reaches of the stream flows has asserted jurisdiction to enjoin a diversion of water in another State through which the upper reaches of the stream flow, it is important that this court put the question of jurisdiction beyond controversy.

In this particular case over one hundred of the defendants have filed separate cross-bills against co-defendants. These cross-bills present issues as to priority of use of water between the several defendants. If these cross-bills are entertained and the issues made by the cross-bills and the original bill are tried, many months of the time of the court, many thousands of dollars of costs to the litigants must be expended before a decision is reached, which decision may be of absolutely no force because of the lack of jurisdiction in the court. It is essential, therefore, in this particular case, that the question of jurisdiction be determined before the parties are subjected to the expenditure incidental to, and the time of the court occupied by what may ultimately prove to be a purposeless trial.

We further submit that the questions involved in this appeal are of great public importance and concern, inasmuch as it should be finally determined by the court of last resort whether the jurisdiction of the United States Circuit Court, having its district in one of the States of the Federal Union, is infringed and interfered with by an action begun and prosecuted in the State court of another State, embracing the upper reaches of a stream, for the purpose of quieting the title to the waters of such stream flowing in the latter State for use upon lands lying in and riparian to that stream in the latter State, which said stream also flows into and through the State which constitutes the district of the United States Court, and in which United States Court there had, prior to the commencement of the action in the State court, been an action commenced against the grantor of the plaintiff in the action brought in the State court to enjoin said grantor from diverting any of the waters in said stream.

In this case the question of the sovereignty of a State over the realty within its boundary is directly involved. If the courts of one State have jurisdiction to adjudicate directly as to and bind the titles to real property in another State, there is nothing left to the sovereignty of the latter State except a shell. A State acting within constitutional limitations is supposed to be absolute in the enactment and enforcement of laws governing the title to real property situate within

that State. But if foreign courts, in no way responsible to the people of a State, have power to adjudicate directly as to and bind titles to realty in the State, none of the attributes of sovereignty remain except the name. That is one of the vital questions that form the basis of this appeal.

The questions involved in this appeal are also of great public importance and concern, inasmuch as Henry Wood, J. O. Birmingham, Chas. Snyder, and Chas. Johnson, cross-complainants, are all citizens of the same State with T. B. Rickey, the cross-defendant, and the jurisdiction of the United States Circuit Court for the district of Nevada is invoked by cross-bills to try controversies exclusively between them, as to the prior right to the use of the water, and that, too, while cross-complainants admit the claims to the use of the water by the complainant, Miller & Lux, in the action, and when the cross-complainants allege their use and diversion and right to the water in the State which constitutes the district of the United States Court and allege the use and diversion of the water by the defendant, T. B. Rickey, under a claim of right so to do, in another State higher up on the same stream.

There are three questions involved in this appeal.

First, as to the jurisdiction of the United States Circuit Court for the district of Nevada in a local ac-

tion over water rights in the California portion of a stream, which stream rises in and flows through and out of the State of California into and through the State and District of Nevada.

Second, assuming that the United States Circuit Court for the district of Nevada, in a local action over water rights, has jurisdiction of rights in the California portion of the stream, the second question is as to the jurisdiction of the said court over a controversy between co-defendants in said original action, all citizens of the same State, initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights in the stream in California claimed to be owned by the former co-defendant, the cross-complainant.

Third, assuming that the said United States Circuit Court for the district of Nevada, in such a local action, has jurisdiction over water rights in the California portion of the stream, and assuming that the said United States Circuit Court has jurisdiction over a controversy initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights claimed by said former co-defendant in the stream, yet, if, prior to the filing of such cross-bill, the said cross-defendant shall have commenced an original action in the State Court of the State of California to quiet his title to rights in the stream in the State of California against cross-com-

plainant, is not the jurisdiction acquired by the Court of the State of California in the actions so commenced superior and exclusive over the subject matter and controversies between the parties to that action to any which was afterward sought to be vested in the Federal Court for the district of Nevada by filing the cross-bills therein?

These three propositions will be discussed in their order.

I.

THE FIRST QUESTION IS AS TO THE JURISDICTION OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA IN A LOCAL ACTION OVER WATER RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, WHICH STREAM ARISES IN AND FLOWS THROUGH AND OUT OF THE STATE OF CALIFORNIA INTO AND THROUGH THE STATE AND DISTRICT OF NEVADA.

As noted in the statement of facts, the decree herein rests on the proposition that the actions commenced by petitioner in California present the same issues as were thereafter presented by the cross-bills filed by respondents in the United States Circuit Court of Nevada in said original action of *Miller & Lux* vs. *T. B. Rickey et al.* (Trans., pp. 17-18).

We desire to argue a single proposition, viz., THAT THE ACTIONS COMMENCED BY PETITIONER IN CALI-

FORNIA DID NOT, AND COULD NOT, PRESENT THE SAME ISSUES AS WERE PRESENTED BY THE CROSS-BILLS FILED BY RESPONDENTS IN NEVADA, FOR THE REASON THAT THE COURT SITTING IN NEVADA HAS NO JURISDICTION TO TRY ANY ISSUE PRESENTED IN THE CALIFORNIA ACTIONS, or vice versa.

The primary propositions in support thereof are:

1. *The action in Nevada is a local action to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said United States Circuit Court must necessarily be situate exclusively within the State of Nevada, and thus the only issues presented by said cross-bills in said action are as to respondents' title to said realty in Nevada.*

2. *The actions in California are local actions to quiet title to realty, which, from the inherent limitations on the jurisdiction of the said California Court, must necessarily be situate exclusively within the State of California, and thus the only issues presented by said actions are as to petitioner's title to said realty in California.*

Wherefore, the issues presented in the California actions being as to the title to realty in California can not be the same issues as are presented in the Nevada action, which are as to the title to a different realty, situate in Nevada.

Both the actions commenced by respondent

filing the cross-bills in the State of Nevada and the two actions commenced by petitioner in the State of California were actions to establish and quiet title to real property and were local actions, and each action was local to the State wherein it was brought. This doctrine, with which we fully agree, was announced by the Court of Appeals in this case, (see *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., 11) and is supported by the authorities cited in the opinion, as well as by the leading case of *Northern Indiana R. R.* vs. *Michigan Central R. R. Co.,* 15 How., 233, and by the following authorities as well:

Stillman vs. *White Rock Mfg. Co.,* 23 Fed. Cases, 83; No. 13446;

Morris vs. *Remington,* 1 Parsons (Penn.), 387;

Gould on Waters, 3d. Ed., par. 445;

Bumps on Fed. Prac., p. 138;

Angel on Watercourses, 7th Ed., par. 418;

Enc. of Pleading and Practice, Vol. 22, p. 1158;

Bouvier's Law Dictionary, p. 66, par. 9;

Gould on Pleading, p. 114;

The Company of the Mersey vs. *Irwell Mfg. Co.,* 2 East, 498;

United States vs. *Rio Grande Dam, etc., Co.,* 174 U. S., 690;

Bates' Fed. Eq. Pro., par. 71;
United States vs. *Winans*, 73 Fed., 72;
Pomery Eq. Jrsp., Sec. 298;
Mississippi & Mo. R. R. Co. vs. *Ward*, 67 U. S., 485.

It is universally held that the jurisdiction of a court in a local action is confined to a subject matter situate within the territorial limits of the court's jurisdiction.

Northern Indiana R. R. Co. vs. *Mich. Central R. R. Co.*, 15 Howard, 233;
Livingston vs. *Jefferson*, 1 Brock, 203, Fed. Case No. 8411;
McKenna vs. *Fiske*, 1 Howard, 241;
Massey vs. *Watts*, 6 Cranch, 148;
Conant vs. *Deep Creek Irrigation Co.*, 23 Utah, 627, 66 Pac., 188;
Davis vs. *Headley*, 22 New Jersey Equity, 115;
Carpenter vs. *Strange*, 141 U. S., 105;
Guaranty Trust Co. vs. *Delta Co.*, 104 Fed., 5;
Story on Conflict of Laws, 7th Ed., Sec. 5433, p. 685;
Watts vs. *Waddle*, 6 Peters, 389;
Watkins vs. *Lessee*, 16 Peters, 25;
Corbett vs. *Nutt*, 10 Wallace, 457;
Boyce vs. *Grundy*, 9 Peters, 275;

Baltimore Association vs. *Alderson,* 90 Fed., 142;
Farmers' Loan & Trust Co. vs. *Northern Pacific Railroad,* 69 Fed., 871;
Bates' Fed. Equity Procedure, Secs. 70-75;
Texas & Pacific Railroad Co. vs. *Gray,* 86 Texas, 571;
Pine vs. *New York,* 185 U. S., 93;
People vs. *Central R. R. Co.,* 42 N. Y., 283.

The distinction between local and transitory actions exists as much in determining the jurisdiction of courts of equity in equitable proceedings as it does in courts of law in legal proceedings. This doctrine was also announced by the Court of Appeals in this case. See *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., p. 11.

See also,

Wharton, Conflict of Laws, 2d ed., 282, 288;
Lewin on Trusts, vol. I, p. 129, star pages 48-49;
Morris vs. *Chambers,* 29 Beaver, 246, same, 3 De G. and F., 583;
Dicy on Conflict of Laws, p. 214;
Harris vs. *Harrison Law Rep.,* 8 Chancery Appeals, 342;
Jenkins vs. *Lester,* 131 Mass., 355;
Bates on Fed. Equity Pro., Vol. 1, Sec. 75;

Huntington vs. *Atrol,* 146 U. S., 656;
Greeley vs. *Low,* 155 U. S., 58, 76;
Northern Indiana Railroad Co. vs. *Mich. Central Railroad Co.,* 15 Howard, 233;
Miss. & Missouri Railroad Co. vs. *Ward,* 67 U. S., 485;
Pomeroy, Equity Jurisprudence, 2d ed., Vol. 1, Sec. 298 and Sec. 1318;
Story's Conflict of Laws, 7th ed., Sec. 534, p. 685;
Stillman vs. *White Rock Manufacturing Co.,* Fed. Cases, No. 13,446;
Morris vs. *Remington,* select equity cases, Parsons, 387;
Gould on Waters, Sec. 446;
Atlantic Dredging Co. vs. *Bergeneck Railroad Co.,* 44 Fed., 208;
Story, Equity Jurisprudence, 12th ed., Sec. 774;
People vs. *Colorado Railroad Co.,* 42 Fed., 638;
Atlantic & Tel. Co., 46 New York Sup. Ct., 377;
Western Union Telegraph Co. vs. *Western Railroad Co.,* 8 Baxter, Tennessee, 54;
Marshall vs. *Turnbull,* 34 Fed., 827;
Western Union Telegraph Co. vs. *Pacific & Atlantic,* 49 Illinois, p. 90;
Fargo vs. *Redfield,* 22 Fed., 373-375;

Port Royal Railroad Co. vs. *Hammond,* 58 Georgia, 523;
Montgomery vs. *Commercial Bank,* 1 S. and M. and Ch., 632;
Northfork Railroad Co. vs. *Postal Telegraph Co.,* 88 Virginia, 396;
Linsey vs. *Silver Star Mining Co.,* 66 Pac., 382;
Texas & Pac. Railroad Co. vs. *Gay,* 86 Texas, p. 571;
Guarantee Trust Co. vs. *Deta & P. L. Co.,* 104 Fed., 5;
Baltimore B. N. L. Ass'n vs. *Alderson,* 90 Fed., 142;
Carpenter vs. *Strange,* 141 U. S., 87;
Farmers' Loan Trust Co. vs. *No. Pac. Railroad Co.,* 69 Fed., 871;
Washburn Easements, 3d ed., 692;
Smith's Leading Cases, p. 1064;
Encyclopedia of Pleading and Practice, Vol. 14, pp. 1122, 1125-1126, 1106;
Gould on Waters, 3d ed., Sec. 444;
Angel on Watercourses, 7th ed., Sec. 418;
Johnson vs. *Superior Court,* 65 Cal., 567:
Gilbert vs. *Water Power Co.,* 19 Iowa, 319;
People vs. *Central Railroad Co. of N. J.,* 42 N. Y., 283;
Wood on Nuisances, 3d ed., Sec. 830;
Gilbert vs. *Water & Power Co.,* 19 Iowa, 319;

Elred vs. *Ford*, 36 Wis., 530;
Horn vs. *City of Buffalo*, 49 Hun., 76;
Buck vs. *Ellenbolt*, 84 Iowa, 394.

These actions being to quiet title to real property, and the issues presented thereby being as to the title to the realty that constitutes the subject matter of the respective actions, in order to sustain the decree herein which is based on the finding that the same issues were presented by the California actions as were thereafter presented by the cross-bills in the Nevada action, IT MUST APPEAR THAT THESE RESPECTIVE ACTIONS HAD SOME COMMON SUBJECT MATTER OVER WHICH THE NEVADA COURT AND THE CALIFORNIA COURT HAD CONCURRENT JURISDICTION.

From the very nature of local actions and the limitations on the jurisdiction of these respective courts created by the Constitution and the laws of Congress set out and referred to in the foregoing authorities, it is a manifest impossibility for there to be a common subject matter, real property, over which in local actions courts, either State or Federal, sitting in different States, can have concurrent jurisdiction.

The only statute that we have been able to find that extends the jurisdiction of a Federal court in a local action so that it may in any case include a subject matter outside of its district, is contained in Sec. 742, Rev. Sts., which reads as follows:

"Any suit of a local nature, at law or in equity,

where the land or other subject matter of a fixed character lies partly in one district and partly in another, WITHIN THE SAME STATE, may be brought in the Circuit or District Court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause *mesne* or final process to be issued and executed as fully as if the said subject matter were wholly within the district for which such court is constituted."

In no instance has the jurisdiction of courts, either State or Federal, been extended so that courts sitting in different States could have concurrent jurisdiction in a local action over a common subject matter situated either wholly in one State or wholly in the other State, or partly in one State and partly in the other.

Therefore, these actions being local actions to quiet the title to real property, it is inherently impossible that the same issues be presented in the actions brought by petitioner in California as were presented by the cross-bills filed by respondents in Nevada.

This petition might be submitted on the foregoing statement of these broad general principles on which all courts are in accord. But in view of the importance of the interests herein involved, and of the wide-reaching public importance of a decision finally determining the limits of the jurisdiction of the Federal Courts in actions involving water rights in interstate streams, we will respectfully submit the prop-

ositions herein set forth to a more minute and careful analysis.

In the discussion which will immediately follow, it will be assumed that the rights of both parties to the water of the stream stand on a parity. That is to say that both base their rights to the water upon appropriation. This is not, however, the case. The laws of the State of California confer rights upon the owners of riparian lands to use the water, and the right is not determined by priority of use, as are the rights between appropriators. In fact, the right to use water by riparian owners in California is not dependent upon actual use. *Lux* vs. *Haggin,* 69 Cal., 255, while in Nevada the law is entirely of appropriation.

When, therefore, in the discussion, we place the rights of both parties upon the basis of appropriation, we are in a measure surrendering the advantage of position. In reviewing the decision of the Court of Appeals, we will call attention to this difference in the laws of the two States.

Putting aside for the time any consideration of the effect of rules limiting the jurisdiction of courts, what, in the broadest sense, are the property rights described by the facts set out in the bills of complaint filed in the courts of Nevada and California, respectively?

Briefly, respondents, in their cross-bill filed in the

United States Circuit Court of Nevada, state facts showing the ownership of a right to divert and use for irrigation, certain water of the Walker River in Lyon County, Nevada (Trans., pp. 14-15). The primary elements of such a water right in a natural stream are:

First, the right to have the water flow, unimpaired in quality or quantity, from its source, down the stream to the point of diversion.

Second, of the right to divert the water from the stream when it reaches his point of diversion.

Cole vs. *Richards* (Utah), 75 Pac., 376;
Black's Pomeroy on Water Rights, par. 64;
Farnham on Waters & Water Rights, fol. 3, Sec. 674;
Phoenix Water Co. vs. *Fletcher*, 23 Cal., 482.

The right of the appropriator to have the water flow unimpaired in quantity or quality from above, down the stream to his point of diversion, while it does not consist of an actual ownership of the corpus of the particles of water flowing in the stream above, yet it is a substantial right and interest in the stream itself which courts will protect.

Black's Pomeroy on Water Rights, Sec. 64;
Duckworth vs. *Watsonville W. & L. Co.* (Cal.), 89 Pac., 338;
Cole vs. *Richards* (Utah), 75 Pac., 376.

in which case the Court said:

> "It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, *the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained,* and any interference with the stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

Taken most broadly and construed most liberally in its favor, respondents' rights, acquired by their appropriations from this stream in Nevada, consist:

First, of the right to have the water of the Walker River flow, to the extent of respondents' appropriation, unimpaired in quantity or quality, from its source in the State of California, down through the State of California toward respondents' point of diversion as far as the California State line.

Second, of the right to have the water of the Walker River to the extent of respondents' appropriation, flow, unimpaired in quantity or quality, from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to respondents' point of diversion.

Third, of the right to divert the water when it reaches the point of diversion.

That the courts of California will protect respondents' right to have the water of the Walker River flow from its source, down through the State of California toward its point of diversion as far as the Nevada line, has been held in

Howell vs. *Johnson,* 89 Fed., 559;
Morris vs. *Bean,* 123 Fed., 618;
Hoag vs. *Eaton,* 135 Fed., 411;
Anderson vs. *Bassman,* 140 Fed., 14-20.

That the courts of the State of California have no jurisdiction to protect, determine, or affect respondents' right to have the water of Walker River flow from the point where the stream crosses the State line from California into Nevada, down through the State of Nevada to its point of diversion, or respondents' right to divert the water when it reaches its point of diversion in Nevada, is unanswerably announced in

Conant vs. *Deep Creek Irrigation Co.,* 23 Utah, 627, 66 Pac., 188;
Lamson vs. *Vailes,* 27 Colo., 201, 61 Pac., 231.

These authorities hold that to be the exclusive function of the courts of the State of Nevada.

Likewise, we submit, the courts of Nevada, State or Federal, have no jurisdiction to protect, deter-

mine, or affect respondents' right to have the water of Walker River flow from its source in the State of California down through the State of California. That is the exclusive function of the courts of the State of California. The courts of California possess, and will exercise that function.

Howell vs. *Johnson, supra;*
Morris vs. *Bean, supra;*
Hoag vs. *Eaton, supra;*
Anderson vs. *Bassman, supra.*

That the courts of Nevada do not possess, and can not exercise the function of determining and protecting rights in the California portion of the stream, we submit as the first pivotal point in this case.

Turning to the rights of petitioner involved, as the subject matter in the actions brought by petitioner in the Superior Court of California, as described in the complaints, they consist of a water right in the Walker River in the State of California (Trans., pp. 8-13). This right, as we have seen in its elemental parts, consists:

First: Of the right to have the waters of the stream flow from its source down through the State of California unimpaired in quantity or quality to petitioner's point of diversion in the State of California.

Second: Of the right to divert the water at that point.

This is a right the Superior Court of California can protect, and an action to quiet title to this right was properly brought in said Superior Court. But it is obviously manifest that petitioner could not have brought an action in a court sitting in the State of Nevada, either State or Federal, to quiet its title to this water right in the State of California. A judgment of a Nevada court quieting title to real property in the State of California would be a mere nullity. Yet complainants, in the cross-bills filed in the original action, are simply turning the other side of the shield to the front and bringing an action in the State of Nevada in an attempt to quiet their title to a water right they claim in the stream in the Sate of California because they happen to also claim a water right in the stream in the State of Nevada.

The fact that respondents, by virtue of their appropriation in Nevada, happen to have a right in this stream in the State of Nevada, as well as in California, does not amplify the jurisdiction of the Nevada court so as to enable it to adjudicate the title in California. Petitioner might change its point of diversion and move it down the stream from the State of California into the State of Nevada, and thus acquire, in addition to its right to have the water flow down the stream in California, a right to have the water flow down the stream and be diverted in the State of Nevada, but by so doing, petitioner could not vest the Nevada court with jurisdiction over its right to

have the water flow down the stream in California. It is true that, after it changed its point of diversion down the stream into the State of Nevada, the Nevada court could protect its right to have the water flow down the stream in the State of Nevada, but the Nevada court would have no more jurisdiction to protect its right to have the water flow down the stream in the State of California after it changed its point of diversion into the State of Nevada, than when the point of diversion was in the State of California. The right to have the water flow down the stream is inherent in the stream, and is where the stream is, and that part of the right that is in the California part of the stream is exclusively within the jurisdiction of the California court, and that part of the right that is in the Nevada part of the stream is exclusively within the jurisdiction of the Nevada court.

Respondents' main argument in support of the jurisdiction of the United States Circuit Court for the State of Nevada was, that a stream is, by its very nature, an *indivisible res.* Being indivisible, if a part of it is within the jurisdiction of a court, the whole of it is within the jurisdiction of that court. Thus, as the lower portion of this stream flows through the jurisdiction of the United States Circuit Court for the district of Nevada, that court has jurisdiction to adjudicate the rights in the whole stream. Likewise,

it can be argued that, as a portion of the stream flowed through the State of California, the stream being an *indivisible res,* the courts of the State of California have jurisdiction to adjudicate rights in the entire stream. In other words, the argument is to the effect that this stream is a subject matter over which the courts of these respective States have each complete and concurrent jurisdiction. As before observed, this argument of the *indivisible res* would empower the California court to adjudicate as to the rights to have the water flow exclusively through and be diverted from the Nevada portion of the stream, and would empower the Nevada court to adjudicate the right to have the water flow exclusively through, and be diverted from the California portion of the stream. The fact that the water flows from the State of California into the State of Nevada could not render the jurisdiction of the California court over the Nevada portion of the stream any different from the jurisdiction of the Nevada court over rights in the California portion of the stream, if the stream is an *indivisible res.* If the stream is an *indivisible res,* it can not be divisible when you look down the stream, and indivisible when you look up the stream.

As above noted, there is no authority in law giving courts of different States concurrent jurisdiction over the same subject matter in a local action. There is nothing any more indivisible about a stream, then

there is about a piece of land, or a wagonroad or a railroad lying partially in two States. It is true the particles of water usually flow one way in a stream, whereas the rights in a wagonroad or a railroad contemplate a movement in both directions along the way, but this would render them, if anything, more indivisible. A stream flowing from British Columbia into the United States, or vice versa, if an *indivisible res,* would be both wholly in the United States and wholly in British Columbia. But this question of the indivisible nature of a stream and the concurrent jurisdiction of courts of different States thereover, is not an open question. It came before this court in the case of the *Miss. & Mo. R. R. Co.* vs. *Ward,* 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River, and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Iowa and Illinois is the center of the Mississippi River, and thus one-half of the stream and one-half of the bridge only were within the

territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, or if the courts of both States had concurrent jurisdiction, as was argued by counsel in the court below, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois. But the Supreme Court of the United States did not view either the bridge or the stream as indivisible, or the jurisdiction of the respective courts as concurrent over the entire stream, and held that the boundary line of the State of Iowa was the limit of the Iowa court's jurisdiction, and thus determined that the court could neither inquire into, nor adjudicate, concerning rights in the stream or the effect of the bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

> "This is a question that we can not examine nor reach by a decree, as the relief suggested is

clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal courts across the Mississippi River by enlarging the judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an Act of Congress."

Again, Mr. Justice Nelson, while dissenting from the majority opinion of the court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa, and used the following language:

"The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any

local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for, divide a bridge, and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, absolutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that, this action being one to abate a nuisance, the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the ultimate test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

The Court of Appeals speaking in the case of

Rickey Land & Cattle Co. vs. *Miller & Lux,* 152 Fed., 11, which opinion is referred to and made a part of the opinion in this case, lays stress on the fact that respondents' water right is *an easement* appurtenant to certain lands "REALTY" which lie in Nevada, and, speaking of the right or easement, says, "IT SAVORS OF, AND IS PART OF, THE REALTY ITSELF," and thus the suit is "*one concerning or pertaining to that realty*," from which the deduction is made that, the realty to which the right is appurtenant being in Nevada, the entire right itself must be in Nevada. The conception simply is that an easement must, of necessity, have the same physical location as the land to which it is appurtenant. That this conception is obviously erroneous, seems too clear for argument. Nature fixes the location of easements. They are located in the servient tenement, and thus necessarily totally exterior to the dominant tenement to which they are appurtenant. As was said by way of illustration by Justice Woodbury in the leading case of *Stillman* vs. *White Rock Mfg. Co.,* 23 Fed. Cases, p. 83, in speaking of a water right in an interstate stream:

> "Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in

their locality. Nature fixes the locality of each, and one may be in one town, county, or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in another for the injury committed there."

See also,

Bannigan vs. *City of Worcester,* 30 Fed., 394.

By no form of specious reasoning can this right in the California portion of this stream be moved down and located within the territorial limits of the jurisdiction of the Nevada court simply because it happened to be appurtenant to land in Nevada. That conception would be directly in conflict with the cases of

Howell vs. *Johnson, supra;*
Morris vs. *Bean, supra;*
Hoag vs. *Eaton, supra;*
Anderson vs. *Bassman, supra.*

Those were each cases brought in the courts of upper States to protect and quiet the titles to water rights in the stream in the upper State, which righs were appurtenant to lands in the lower State. If the water rights appurtenant to land of necessity have the same physical and territorial location as the land, then in each of those cases there was no subject matter within the jurisdiction of the court.

But, even conceding this manifestly erroneous doc-

trine to be correct, conceding that respondents' land being located in Nevada has the effect of causing respondents' rights in this stream in California which are appurtenant to this land to be drawn down and located in Nevada, then there is nothing left within the jurisdiction of the California court to make a conflict. The California court simply has no jurisdiction over the subject matter, and its judgment would be a nullity and a vain act. Courts of equity will not interfere to restrain the doing of a vain act.

It is true that the subject matters of these actions in California and Nevada, respectively, are quite closely related, inasmuch as the flow of the stream in Nevada is dependent on the flow of the stream in California, but that dependency does not make them one and the same. This argument is simply that of the *indivisible res* approached from a slightly different point of view.

An unlawful diversion in California may diminish respondents' right in the stream both in California and Nevada, lessening the flow of the stream in California, and, as a consequence, lessening the flow of the stream in Nevada. Violating and injuring respondents' rights in the stream in the State of California may cause, undoubtedly, a resultant injury to respondents' rights in the stream in the State of Nevada, but that does not change the location of the rights that are directly injured by petitioner. The

right of the appropriator is to have the water flow unimpaired down the stream to the point where he desires to divert it. That right exists in the stream as an easement right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Petitioner's diversion in California, if a trespass, is one committed on respondents' right or easement to have the water flow down the stream in California toward its point of diversion. There is the true injury, and there is where respondents must have protection, irrespective of whether they desire to divert the water from the California or the Nevada portion of the stream. If respondents can protect their rights in the stream in California, then they may receive the amount of water they are entitled to and desire to divert in the State of Nevada at the State line dividing the two States. Respondents' right directly affected by the California action, are the rights to have the water flow unimpaired down the stream in and through the State of California toward the place where respondents may desire to divert the water, whether in California or in Nevada. For instance, suppose that respondents, instead of desiring to appropriate this water from the stream in the State of Nevada, should desire to appropriate it in the State of California, then, beyond question, their rights in the stream are in the State of California and beyond the jurisdiction of the

Nevada court. *Conant* vs. *Deep Creek Irrigation Co., supra.*

Then let respondents change their point of diversion and use down the stream onto lands in the State of Nevada. By so doing, have they lost their rights in the stream in the State of California? Or have they not the very same rights in the stream in the State of California that they had before they changed their place of use? We respectfully submit they have. They have lost no rights in the stream in the State of California by changing their point of diversion and use to a point lower down on the stream and in the State of Nevada, and they can at any time change their point of diversion and use back up the stream and into the State of California.

Hargrave vs. *Cook,* 108 Cal., 80;
Kidd vs. *Laird,* 15 Cal., 180;
Davis vs. *Gale,* 32 Cal., 26.

By changing their point of diversion and use from the State of California to a place lower down on the stream and in the State of Nevada, respondents may acquire rights in the stream in the State of Nevada, namely, to have the water flow uninterrupted down the stream in the State of Nevada, that they did not have when they diverted all the water they were entitled to in the State of California; but the acquisition of such new rights to have the water flow down the stream in the State of Nevada that would result

from the changing of their point of diversion and use from a place up the stream and in the State of California to a place lower down and in the State of Nevada, would not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California would be there just as much as they ever were, and any action having as its subject matter rights in the stream in California might affect these rights, but the rights affected would be just as much in the State of California in the case supposed after the point of diversion and place of use had been transferred from the State of California down the stream into the State of Nevada, as they were prior to the change of the place of diversion and use, when both parties claimed the right to use the water in the State of California.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into the courts of Nevada, which are the only courts having jurisdiction thereof.

Just as the courts of California can not protect the appropriator's rights to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State.

The precise point under discussion was involved in the case of *Stillman* vs. *White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diver-

sion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

> "Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it, to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdicion of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, *what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.* After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream, where the right to the soil terminates; and, if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses,* p. 11, Sec. 3, and cases there cited; *Webb* vs. *Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as

the affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259. *The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there. Thus, a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Cook, 62.*

"The chief error in the position of the respond-

ents is in supposing that the plaintiffs have no rights whatever beyond the center of the river, or no interests to be protected there." (Italics ours.)

See also *Bannigan* vs. *City of Worcester,* 30 Fed., 394.

THIS COURT CAN NOT AFFIRM THE DECREE HEREIN, WHICH WAS AWARDED ON THE NECESSARY GROUND THAT THE SUBJECT MATTER OF THE ACTION COMMENCED BY PETITIONER IN THE STATE OF CALIFORNIA IS THE SAME AS THE SUBJECT MATTER OF THE ORIGINAL BILL FILED BY RESPONDENTS IN THE STATE OF NEVADA WITHOUT RULING DIRECTLY IN CONFLICT WITH THE DECISIONS ANNOUNCED IN THE ABOVE-CITED CASES OF

Howell vs. *Johnson,* 89 Fed., 559;
Morris vs. *Bean,* 123 Fed., 618;
Hoag vs. *Eaton,* 135 Fed., 411;
Anderson vs. *Bassman,* 140 Fed., 14-20.

These cases all hold that the right of respondents to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the sub-

ject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State, in the courts of the upper State. These actions were presented on bills of complaint of precisely the same nature as the original bill of complaint in the case of *Miller & Lux* vs. *T. B. Rickey et al.,* which the Court of Appeals, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But, we submit, that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by petitioner herein in Mono county, California, to quiet its title to the waters of the Walker river, in the State of California.

Supposing that respondents herein had gone into the United States Circuit Court for the Northern District of California and commenced an action against petitioner herein to enjoin petitioner from diverting the water of the Walker river, in the State of California, and set up their rights and appropriations in said Walker river, where would have been

the subject matter of that action? Clearly, it would have been exclusively in the State of California. Should respondents prevail, the said court of California would have jurisdiction to protect their rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect respondents' rights in the stream would stop at the State line. It could deliver the water at the State line but no further. Petitioner herein might, if such a decree was rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above respondent's point of use in the State of Nevada, and the decree in the court of the State of California could in no wise determine the rights in the stream in the State of Nevada or protect respondent's rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, respondents would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by petitioner in the State of California are in the State of California. If these same rights and this same subject matter are within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have

concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above-cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. These were the rights of respondent that were involved in the action commenced by petitioner in Mono county, California, and none of those rights are involved in the action pending in the State of Nevada. Thus, the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of

rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions, Miller & Lux would establish and protect its entire rights in the stream in California, as well as in Nevada, but it could not do this otherwise. By commencing an action in California, it could not protect its rights in the stream in the State of Nevada, and, likewise, by commencing an action in the State of Nevada it could not protect its rights in the stream in the State of California.

TO SUSTAIN THE DECREE HEREIN, IT IS NECESSARY TO APPLY THE DOCTRINE OF LIS PENDENS. TO DO SO THIS COURT MUST HOLD THAT THE SUBJECT MATTER OF A LOCAL ACTION COMMENCED IN THE STATE OF NEVADA IS REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA.

The original bill herein was filed against T. B. Rickey. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, petitioner herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending. (Black on Jdmts., §550; Freeman

on Jdmts, §§ 196-7.) For the doctrine of *lis pendens* to apply, the *res* must be within the territorial jurisdiction of the court.

Carl vs. *Lewis Coal Co.*, 96 Mo., 149;
Sheldon vs. *Johnson*, 4 Sneed (Tenn.), 683.

The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate wholly in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the bill filed by respondent in that action, yet the *res* transferred was the subject matter of the action in the Mono county suits, and thus it follows that there is no room for the application of the doctrine of *lis pendens* by which it is sought to connect petitioner herein with the original action of *Miller & Lux* vs. *Rickey et al.* and the cross bills filed by respondents in that action.

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in

streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream, and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this branch of the argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co.* vs. *Miller & Lux,* 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water

flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal heriditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land (*Jacobs* vs. *Lorenze,* 96 Cal., 340). The easement in the water may be transferred from a present owner to another, and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court, therefore, made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the

stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux as well as the easement claimed by cross-complainants attached to the entire stream above the ditches of Miller & Lux and cross-complainants, respectively. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada petitioner disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to realty," and that the right to water was to be treated as real estate, and further that the court of Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono county case in California was unequivocally real estate in the State of California. The Court concluded that the Nevada court had no jurisdiction to quiet the title to this land. How, then, did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of the Court supporting the jurisdiction is as follows, see page 17:

> "The appellant's counsel maintain that, because the appellant has set up in its answer and

cross bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere, which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of Cali-

fornia, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appro-

priators, though the latter withdrew the water within the limits of a different State. *Howell* vs. *Johnson*, 89 Fed., 556; *Hoge* vs. *Eaton*, 135 Fed., 411; *Anderson* vs. *Bassman*, 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson* vs. *Bassman*. 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson river, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.'"

As the whole decision rests upon this part of the opinion, we desire to follow this reasoning sentence by sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

"The appellant's counsel maintained that because the appellant has set up in its answer and cross-bill to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its

> right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada."

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono county as standing in the same relation to the original case, as would such facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be practically to make it a plea to the jurisdiction, not of the cause of action in Nevada, but to the cause of action in the State of California. And if Miller & Lux had *expressly* stated a cause of action in the water in the State of California, such plea would have been sustained.

The next sentence is also predicated upon the same conception:

> "Complainant must be permitted to proceed upon the case made by its pleadings and the defendant can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant."

It is observed that the Court uses the words "can not defeat the jurisdiction." That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: "It may be said that the court " in Nevada has not the power to quiet the title of " the defendant in the State of California." With this statement there is no controversy, but we do further contend that the court of Nevada, has no power to quiet the title of the complainant, *Miller & Lux,* in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

> "But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defendant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux,* and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of Miller & Lux in and to the water, and that the title of Miller & Lux is at all times the subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant " has a right to set up its conflicting interests which " are in California as a defense against the attempt " of the complainant to have its title in Nevada " quieted, because the complainant's title in Nevada " must depend upon whether complainant has the " better title as against defendant *in the State of Cali-* " *fornia.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of California is only another way of determining what

is the title of Miller & Lux to the waters *in the State of California.* After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claim an easement in the stream from their ditch in Nevada to the source of the river. Rickey claims an easement in that part of the stream

only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the answer and the cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the State of California." We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either,* in the State of California. The Court then proceeds: "Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, through the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and if not, then to settle and quiet complainant's title and rights thereto."

Where? The statement admits that the inquiry is as to the respective rights of the parties in the stream in California. It tacitly admits the interest of both parties in that State, and an inquiry into those rights.

Why, then, should the Court say that the inquiry is to determine Miller & Lux's rights in the State of Nevada, when directly the inquiry is in fact and substance to determine what are Miller & Lux's rights in the State of California. When the Court asserts that it can not adjudicate defendant's rights to the stream in California, it at the same time asserts that it can not adjudicate Miller & Lux's right to the stream in the same State. Yet an adjudication that defendant do not take water from the stream *in the State* of California, is an adjudication of the rights to water in that State in favor of the complainant. The Court changed its viewpoint of the case. Sometimes it held fast to the fact that the subject of the action was the *asserted title of Miller & Lux* in the State of Nevada. Then the viewpoint shifted and argued as though the inquiry in the State of California was not as to the title of Miller & Lux, but was as to the title of the defendant. And it said, the inquiry is to determine defendant's rights in the State of California, so as to determine complainant's rights in the State of Nevada. We submit that the determination of Miller & Lux's rights in the State of California would determine as exactly what Miller & Lux's rights in Nevada were, as would the indirect process of determining what were the defendant's rights in the State of California. One method is direct to the purpose; the other is indirect by process of elimination. But at all times and under all cir-

cumstances the inquiry must be, and is: the asserted rights of Miller & Lux to the water. It never changes to an inquiry into defendant's title or rights at any place.

To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals, on pages 19 and 20, is based upon an assumption of jurisdiction in the court and then further assuming a contention on the part of appellant that the answer of defendant attempts to limit or circumscribe the admitted jurisdiction, whereas the real contention is that the court has no jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise.

Let us assume for a moment that the court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the

State of California. Then, what becomes of the doctrine of lis pendens?

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quieted is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411, and *Anderson* vs. *Bassman,* 140 Fed., 14. As the action in each of those cases was commenced in the State which was uppermost on the stream, it would follow, under the announcement in this case, that the court did not have jurisdiction, because the location of the thing was not within the jurisdiction of the court. We believe those cases were correctly decided, and were so "decided" upon the contention advanced in this case, viz., that the easement of the lower owner on the stream extends throughout the length of the stream above his place of diversion.

The Court of Appeals failed to give recognition to the distinction that the appropriator in the lower State has an interest in the stream in the upper State, while the appropriators in the upper State have no rights whatever to the water in the lower State.

The last sentence quoted from the opinion seems to assume that the rights to the use of water are all acquired by appropriation in both States, and that the appropriator first in time is first in right. The

argument based upon such a conception entirely ignores the rights vested in riparian owners in the State of California.

In the State of Nevada the courts have refused to apply the doctrine of riparian rights to streams. In the State of California the riparian rights are fully recognized as they existed at common law with but one modification, namely, a reasonable use of the water among the several riparian owners for the purposes of irrigation.

Lux vs. *Haggin,* 69 Cal., 255.

In the State of California the riparian owners can use all the water among themselves, and an appropriator upon the stream never acquires any rights as against a riparian owner owning land on the stream above his point of diversion. If the Walker River was entirely in the State of California, then the title to the water would be owned by the riparian owners along its banks, and these riparian owners could use all of the water among themselves to the exclusion of all appropriators. As the stream is not entirely in the State of California, and as the State of Nevada recognizes no such thing as a riparian right, the question arises, who becomes entitled to the use of the water after it crosses the State line. That is to say, who has any rights in Nevada that a *riparian* owner in California, as such, must recognize.

If the riparian right of the State of California ex-

cluded the use for irrigation, then all the water of the stream would run into the State of Nevada. The State of California has modified the riparian right so as to permit the riparian owners to use a reasonable quantity for irrigation. To that extent they deprive the State of Nevada of the water so used. If the State of California can deprive the State of Nevada of a part of the water, it may, by its laws, deprive the State of Nevada of all of its water.

It has not yet been decided in the State of California whether an upper riparian appropriator can use all of the water of the stream as against the lower appropriator. If such should be declared to be the law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points the argument that the appropriator in the State of Nevada by being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux* vs. *Haggin, supra*), so that in inquiring into the rights of appellant in the State of California to the water, you are at the same time inquiring into that which is a

part and parcel of its land. As against such upper riparian owner taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in the stream according to the laws of the particular State in which the rights are asserted.

Barney vs. *Keokuk,* 94 U. S., 324;
Parker vs. *Bird,* 137 U. S., 661;
Hardin vs. *Jordan,* 140 U. S., 371.

Such court cannot administer a common law exclusively appropriation, or exclusively riparian, to conform to the laws of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation,* and to adjudge and command accordingly, ignores absolutely the riparian rights which are a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law

must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself.

There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and what is the thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the *title of Miller & Lux* in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what Miller & Lux's rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of Miller & Lux in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens.*

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is Miller & Lux's title in Nevada, then

to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of California,* then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants, in order to apply the doctrine of *lis pendens,* that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction, the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens,* the thing, subject of the suit, is in the State of California.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First, an action the subject matter of which is in the State of Nevada. Secondly, there is attempted to be presented, between Rickey and Miller & Lux, an issue as to water in the State of California, viz., Miller & Lux's right to water *in the State of California,* of which the Court has no jurisdiction.

The trouble arises in attempting to apply the rule of *lis pendens* in a case where jurisdiction of a subject matter does not exist.

If the court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of California, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals, which deal with abstraction so far as the conclusions of that court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

II.

ASSUMING THAT THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA, IN A LOCAL ACTION OVER WATER RIGHTS, HAS JURISDICTION OF RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, THE SECOND QUESTION IS AS TO THE JURISDICTION OF THE SAID COURT OVER A CONTROVERSY BETWEEN CO-DEFENDANTS IN SAID ORIGINAL ACTION, ALL CITIZENS OF THE SAME STATE, INITIATED BY ONE CO-DEFENDANT FILING A CROSS-BILL TO ENJOIN ANOTHER CO-DEFENDANT FROM TRESPASSING ON RIGHTS IN THE STREAM IN CALIFORNIA, CLAIMED TO BE OWNED BY THE FORMER CO-DEFENDANT AND CROSS-COMPLAINANT.

There are three fundamental and settled propositions of law governing the rights to file cross-bills in an equity proceeding.

FIRST, *no new subject matter can be introduced by a cross-bill, but the subject matter of the original bill and of the cross-bill must be identical.*

SECOND, *a cross-bill cannot interpose new controversies between co-defendants in the original bill,*

but the controversy and the action set out in the cross-bill must be the same as that in the original bill.

THIRD, *the subject matter of the cross-bill must be matter that it is necessary for the cross-complainant to establish as a defense against the action instituted by the original bill.*

Rubber Co. vs. *Goodyear,* 9 Wallace, 807, at page 809, it is said:

> "A cross-bill is brought to obtain a discovery of facts in aid of the defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit and a graft and dependency upon it. If its purpose be different from this it is not a cross-bill, although it may have a connection with the same general subject."

Stonemetz vs. *Brown Co.,* 46 Fed., 851, it is said:

> "A cross-bill *ex terminorum* implies a bill brought by defendant against plaintiff in the same suit, or against both, touching the matter in question in the original bill. (*Story's Equity Pleading,* Sec. 389.) It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matter charged in the original bill.
>
> "It should not introduce new and distinct matters not embraced in the original bill, as they

cannot be properly examined in that suit, but constitute the subject matter of an original independent suit. The cross-bill is auxiliary to the proceedings in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross-bill constitute but one suit, so intimately are they connected together. (*Ayers* vs. *Carver,* 17 Howard, 591; *Cross* vs. *De Valle,* 1 Wall., 5.) It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject. (*Rubber Co.* vs. *Goodyear,* 9 Wall., 807.) In the last cited case the bill was filed for infringement of a patent. The defenses were invalidity of the patent and a license. By the cross-bill the defendant sought to set off a judgment against plaintiff against the damages he might recover in the infringement suit. The Court held the cross-bill improperly filed. A cross-bill must grow out of the matters alleged in the original bill and is used to bring the whole dispute before the Court so that there may be a complete decree touching the subject matter of the action. (*Ex parte Railroad Co.,* 95 U. S., 221.) A cross-bill must be confined to the subject matter of the original bill, and cannot introduce new matters not embraced in the original bill. If it does so, the cross-bill becomes itself an original bill, and there cannot be two original bills in the same cause. (*Dotz* vs. *Phillips,* 24 Wkly. Notes, Cas., 382.) A cross-bill is like an

original bill, except that it must rest on what is necessary to the defense of an original bill, (*Brandin Manufg. Co.* vs. *Prime,* 14 Blatchf., 371.)

"In the case of *Johnson R. S. Co.* vs. *Union S. & S. Co.,* 43 Fed., 331, permission was refused to file a cross-bill in an infringement suit, wherein the defendant set up the claim of right to a trademark or name, for an electrical system, which included the use of a patentee's name as going beyond the case of the plaintiff in the original bill, not necessary as a defense to that bill, and matter entirely foreign to the primary controversy. In *Young* vs. *Colt,* 2 Blatchf., 373, the Court says: A cross-bill, as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill in respect to their mutual title or interest in the subject matter of the suit.

"Where a cross-bill to a bill of foreclosure brought by a party representing the British Goventment set up an independent claim of the respondents against the British Government, it was held, in *Rowan* vs. *Manufacturing Co.,* 33 Conn., 1, to be matter which, upon general principles, could not be set up by a cross-bill, the Court saying:

"If it is true that the matter set up in this cross-bill is wholly independent of the matter set up in the bill, and does not touch or relate to that matter, either for the purpose of defense to it, or for any disclosure relating to it, but is merely set up for the purpose of laying the foundation for some independent relief, it seems quite obvious,

upon authority and principle, that for the purpose of any such independent relief as is asked for, the cross-bill should be dismissed.

"In *Dotz* vs. *Phillips, supra,* a bill was filed for the specific performance of one agreement, and the cross-bill alleged violation of another independent agreement, and prayed relief against the plaintiffs. The Court held that the cross-bill was improperly filed, saying: The plaintiffs seek a specified performance, and that only. It is no answer to that to say that the plaintiffs have broken another agreement relating to another subject. In *Galatin* vs. *Erwin Hopk.,* Ch., 48, the original suit was for foreclosing two mortgages. By cross-bill one of the defendants in her defense sought to impeach for fraud the title of the mortgagor, not only to the mortgaged premises, but to other lands."

See, also:

Stewart vs. *Hayden,* 72 Fed., 402, particularly page 410;

Cross vs. *De Valle,* 1 Wallace, 1, particularly page 14;

Johnson Railroad Co. vs. *Union Switch Co.,* 43 Fed., 331;

Chattanooga Co. vs. *Thedford et al.,* 58 Fed., 347, particularly see page 352;

Eyre vs. *Carver,* 17 Howard, 591, particularly page 595;

Fidelity Trust Co. vs. *Mobile Street Co.*, 53 Fed., 850;
Thurston vs. *Big Stone Gap Improvement Co.*, 86 Fed., 484;
Dickerman vs. *Northern Trust Co.*, 80 Fed., 457;
Bunel vs. *O'Day*, 125 Fed., 303;
Elliott vs. *Pell*, 1 Ch., 263-268;
Gallatin vs. *Erwin*, 1 Hopkins, Ch., 48;
Hogg vs. *Hogg*, 107 Fed., 814;
Johnson vs. *Union Co.*, 43 Fed., 331;
Van Zant Equity Practice, 223;
Story's Equity Pleading and Practice, Sec. 399;
Daniels' Ch. Practice, 4 Ed., Sec. 1549;
Vanerson vs. *Leavitt*, 31 Fed., 376.

The Court of Appeals, in its opinion, grants the proposition that the cross-bill must present matters for a consideration of the Court, which are defensive to the original action.

In its opinion filed herein, in the case of *Miller & Lux* vs. *Thomas B. Rickey and others*, No. 1365, that Court has defined clearly what it considers to be, first, the nature of the action, to wit: an action to quiet title, and, second, the subject matter of that action, to wit: an easement appurtenant to certain land of appellant.

Having determined these two facts, it is not difficult to determine whether the cross-bills filed were

defensive to the original action. The cross-bills *admitted* the cause of action stated in the original complaint, and then set up a cause of action between defendants, both of whom resided in the State of Nevada, wherein the cross-complainants sought to litigate a cause of action of the same nature as the original action *about another subject matter,* to wit: an easement claimed by cross-complainants to be appurtenant to the lands owned by cross-complainant.

Let us closely examine the cause of action stated in the complaint, and the cause of action stated in the cross-complaint, and see whether the establishing of the cause of action stated in the cross-complaint will in any manner be defensive to the original action. Let us view both through the decision of the Court of Appeals to find the nature of the cause of action and the subject matter of the cause of action. The Court declares the original cause of action in the suit of Miller & Lux against Thomas B. Rickey to be an action to quiet title. For the purposes of logically determining the relation of the cross-bill to the original bill, that conception of the nature of the action must continue. Again, the Court, in the case of *Miller & Lux* vs. *Thomas B. Rickey and others,* decided that the subject matter of the action to quiet title, was the right of Miller & Lux to have a definite quantity of water flow down the Walker river to the place of diversion of Miller & Lux, which it deter-

mined was an easement appurtenant to the lands in the complaint described.

The cross-complainants admit this right of complainant, and commenced an action of the same nature as the original bill (because the cause of action in their cross-complaint is stated identically as is the original cause of action). The subject matter of the actions in the cross-bills is a definite quantity of water in the Walker river, which is claimed to be appurtenant to other lands than those described in the original complaint.

The right to the water (the easement in the stream), which is appurtenant to the lands of Miller & Lux and is the subject of the original bill, is not the same right (the easement) to water which is appurtenant to other lands owned by the cross-complainant. It would seem, therefore, that the subject matter of the two actions not being the same, that the cross-bill is improper, and it must be borne in mind that in the case of *Ames Realty Co.* vs. *Big Indian Mining Co.,* 146 Fed., 166, the cross-complainant asserted rights against the complainant in that action, a fact which does not exist in this case. In other words, in the case last mentioned, a defense was asserted against the complainant, while, in this case, no defense whatever is asserted against complainant.

It is difficult to conceive how a cross-bill can be defensive, which admits the cause of action stated in the original bill, as is the case here. It is defensive

only in the same sense that when a debtor is pursued by his creditor, the same debtor must become a creditor as to his own debtors and enforce the obligations owing to him in order that he can better pay any judgment rendered against him in favor of his own creditor, and thereby avoid the injurious consequences which follow the enforcement of a judgment when he is without funds to meet it.

Let us illustrate by a right of way pertaining to several tracts of land owned by A. B. and C. If A commences an action to quiet his title against B and C, it would not be defensive for B, as against A's claim to the easement, to seek to quiet his title against C.

But let us take an illustration more closely resembling the consequences the Court seeks to avoid by permitting this cross-bill, and suppose that there are three rights of way on adjacent strips of land, one appurtenant to the land of A, the other appurtenant to the land of B, and the third appurtenant to the land of C; each is 12 feet wide, and that 12 feet in width is absolutely necessary for use of the way. A dispute arises between these three people regarding the exact location of these several rights of way, and A insists that B's claim of right of way encroaches upon him 6 feet, and A brings an action against B and C. Now, manifestly, if B owns the right of way over the middle strip, and he is compelled to move back 6 feet, he will be curtailed in the width

of his right of way by the claim of C on the other side unless C also moves back. This is only a consequence, however, of A asserting his rights against B. That such consequences may follow, is not in anv sense defensive to the original claim between A and B. It would seem that the conditions, to avoid which the cross-bills in this case are tolerated, are very much akin to this illustration, and in the case taken for illustration we do not think the Court

Whatever consequences may flow from a judgment would tolerate a cross-complaint between B and C, or decree predicated upon a cause of action, that only is defensive which defeats the cause of action. Those wherein B admitted the claim of A.

conditions which exist, or might exist, in case the relief asked for is granted and which may make the observance of the decree onerous are no part of the cause of action. Any proceeding intended to modify the hardships of such a condition is not defensive to the cause of *action* upon which the judgment may be predicated.

Facts are sometimes alleged in defense which are proper for the consideration of a court of equity in qualifying its decree against the defendant. Is the Court prepared to say that the judgment and decree to be rendered in this case against the defendants will so marshal their rights in favor of the plaintiff, or that the decree can be qualified, so that the cross-complaint will not be in disobedience of its com-

mands, as between cross-complainant and complainants, so long as some person holding subordinate is using no more than his share? Unless yes, the Court is powerless to avoid the consequences which the Appellate Court seems to hold sufficient to justify the cross-bill as defensive. Cross-complainants admit Miller & Lux's priority of right to the water, and the judgment must be in favor of Miller & Lux on that priority. The cross-complainant would be in contempt of court if using any water while Miller & Lux was not receiving its full allotment, and that, too, regardless of what trespasses were made by other persons on the stream, unless the Court concedes that a judgment can be framed under the issues made in the cross-complaint against Rickey, whereby the cross-complainant would be exonerated from the effect and commands of the judgment is using only the quantity of water which cross-complainant was entitled to, when other persons were using more than the quantity to which they were entitled. The relative rights of the defendants among themselves is absolutely immaterial as a defense against the original bill; that is to say, it must be defensive as a protection against contempt proceedings, or it must be defensive against the cause of action itself. If, under no circumstances, could the cross-complainant answer a contempt proceeding by saying that the cross-complainant was using no more than the share of water to which he was entitled, and that the cause of

the shortage of complainant's water was the trespass of Rickey upon the stream above, then this cross-bill can not be defensive as giving facts to qualify the terms to the decree, and certainly it can not be defensive in any way to the original cause of action set up in the bill which it expressly admits.

III.

THIRD, ASSUMING THAT THE SAID UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEVADA, IN SUCH A LOCAL ACTION, HAS JURISDICTION OVER WATER RIGHTS IN THE CALIFORNIA PORTION OF THE STREAM, AND ASSUMING THAT THE SAID UNITED STATES CIRCUIT COURT HAS JURISDICTION OVER A CONTROVERSY INITIATED BY ONE CO-DEFENDANT FILING A CROSS-BILL TO ENJOIN ANOTHER CO-DEFENDANT FROM TRESPASSING ON RIGHTS, CLAIMED BY SAID FORMER CO-DEFENDANT AND CROSS-COMPLAINANT IN THE STREAM, YET, IF, PRIOR TO THE FILING OF SUCH CROSS-BILL, SAID CROSS-DEFENDANT SHALL HAVE COMMENCED AN ORIGINAL ACTION IN THE STATE COURT OF THE STATE OF CALIFORNIA TO QUIET HIS TITLE TO RIGHTS IN THE STREAM IN THE STATE OF CALIFORNIA AGAINST CROSS-COMPLAINANT, IS NOT THE JURISDICTION ACQUIRED BY THE COURT OF THE STATE OF CALIFORNIA IN THE ACTION SO COMMENCED, SUPERIOR AND EXCLUSIVE OVER THE SUBJECT MATTER AND CONTROVERSIES BETWEEN THE PARTIES TO THAT

ACTION, TO ANY WHICH WAS AFTERWARD SOUGHT TO BE VESTED IN THE FEDERAL COURT FOR THE DISTRICT OF NEVADA BY FILING THE CROSS-BILLS THEREIN?

The suits commenced by petitioner in Mono county, California, were filed on the 15th day of October, 1904 (Trans., p. 8).

The cross-bills of respondents were filed over two months later, to wit: on the 20th day of December, 1904 (Trans., p. 14).

The actions commenced by petitioner in the Superior Court of Mono county, being actions to quiet and establish title to real property, were in the nature of actions *in rem*. They were actions wherein summons could be served by publication.

Arndt vs. *Griggs*, 134 U. S., 316.

In actions *in rem* the jurisdiction of the Court attaches, not at the time of the service of process, but at the time of the filing of the bill.

Rogers vs. *Pitt*, 96 Fed., 668;
Farmers' Loan and Trust Co. vs. *Lake Street Elevated R. R. Co.*, 177 U. S., 81.

From these authorities it appears that, assuming a conflict to exist between the State Court of California and the Federal Court sitting in Nevada, yet, as between petitioner and respondents herein, petitioner having filed his complaint in the California court

more than two months prior to the filing of the cross-bills by respondents in the Federal Court of Nevada, the California Court first acquired jurisdiction and, under all the authorities, the Court first acquiring jurisdiction over a controversy, should be permitted to continue undisturbed to the termination of the case.

Therefore, we respectfully submit:

FIRST, *that the actions commenced by petitioner in California did not, and could not, present the same issues as were presented by the cross-bills filed by respondents in Nevada, for the reason that the Court sitting in Nevada has no jurisdiction to try any issues presented in the California actions.*

SECOND, *assuming that the United States Circuit Court for the District of Nevada, in a local action over water rights, has jurisdiction of rights in the California portion of the stream, yet said Court has no jurisdiction over a controversy between co-defendants in said original action, all citizens of the same State, initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights in the stream in California, claimed to be owned by the former co-defendant and cross-complainant.*

THIRD, *assuming that the said United States Court for the District of Nevada, in such a local action, has jurisdiction over water rights in the California*

portion of the stream, and assuming that the said United States Circuit Court for the District of Nevada has jurisdiction over a controversy initiated by one co-defendant filing a cross-bill to enjoin another co-defendant from trespassing on rights claimed by said former co-defendant in the stream, yet, we respectfully submit, if, prior to the filing of such cross-bill, the said cross-defendant having commenced an original action in the State Court of the State of California to quiet his title to rights in the stream in the State of California against cross-complainant, the jurisdiction acquired by the Court of the State of California is superior and exclusive over the subject matter and controversies between the parties to that action, to any which was afterward sought to be vested in the Federal Court for the District of Nevada by filing the cross-bills therein.

Wherefore, the Court below erred in making the decree herein.

Respectfully submitted.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Petitioner.

F. D. McKENNEY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted]5

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

A comprehensive brief was filed with the petition herein. It would serve no purpose to repeat that argument here. The brief filed with the petition and the brief filed upon the merits in Rickey Land and Cattle Co. *vs.* Miller & Lux, No. 89, argued and submitted with this case, are referred to.

This appeal involves the right of the respondents to file cost bills in the original action of Miller & Lux *vs.* Rickey and of the jurisdiction of the Circuit Court of Nevada to try the rights of the defendant, T. B. Rickey, in California, as between him and the cross-complainants. This question of jurisdiction is the same in some of its aspects as when the jurisdiction was considered between the original complainants, Miller & Lux, and the defendant Rickey. The argument there made is thus in a measure applicable here,

and but a few words will be added to what is offered in the petitioner's brief therein, No. 89.

The rule invoked by respondent is, "*Where a State court and a court of the United States may each take jurisdiction of the matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the others until the duty is fully performed, and the jurisdiction involved is exhausted.*"

Harkrader *vs.* Wadley, 172 U. S., 164.
Freeman *vs.* Howe, 24 How., 450.
Buck *vs.* Coldbath, 3 Wall., 334.
Taylor *vs.* Taintor, 16 Wall., 366.
Ex parte Crouch, 112 U. S., 178.

This rule only applies where the two courts, Federal and State, have *concurrent jurisdiction.* All the cases cited by counsel are of that nature. The rule as stated, by its terms, is so limited. The question here then is, Have the two courts, State court in Mono county, California, and the Circuit Court of Nevada, *concurrent* jurisdiction of any part of the Walker River?

The Federal court will not enjoin the prosecution of an action in a State court upon a cause of action wherein the Federal court has no jurisdiction. As the Circuit Court of Nevada has no jurisdiction to quiet or determine the title of Miller & Lux or of the defendant Rickey in that part of the stream which is in California, there can be no concurrent jurisdiction. When each of two courts have exclusive jurisdiction, the very nature of such jurisdiction prevents either court from interfering with or impairing the jurisdiction of the other.

Merritt *vs.* American Co., 79 Fed., 228, 232.
Baltimore R. R. Co. *vs.* Wabash R. R. Co., 119 Fed., 678.

The bill of complaint alleged that the defendant Rickey diverted the water "*under a claim of right*" (Transcript, page 3), and the cross-complaints also allege the same fact

(page 7, Transcript). Both the original bill and the cross-complaint allege that the water diverted by defendant Rickey under said claim was without right (Transcript, pages 3 and 7). Here were allegations in the original bill which had to be decided before any injunction could issue. In the complaint the locus of this claim of right and of the diversion by defendant Rickey was not alleged. It was therefore necessary to allege it in the plea to the jurisdiction of the court. All defendant Rickey's rights and claims of right were alleged in his plea to be in the part of the stream in the State of California. If these facts had appeared on the face of the bill, it would have defeated the court's jurisdiction at once without a plea. These facts were not offered to "justify" the trespass, as counsel says at page 11 of their brief in case No. 89, but to show that the Nevada court had no right to hear or to adjudicate upon the question of defendant Rickey's rights at all. The allegation of the fact that defendant's trespass was under "claim of right" was necessary to state facts entitling complainant to an injunction. Without this allegation nothing more than a mere trespass would have existed, and that would not authorize an injunction to issue.

Between Miller & Lux and defendant Rickey, under the allegations of the original bill, and between each cross-complainant and Rickey, under the allegations of the cross-complaints, there had to be tried and determined by the Circuit Court this "claim of right" of defendant Rickey to the waters of Walker river. Before the injunction could be decreed, therefore, the claim of right of defendant Rickey to water flowing in California must be determined. This is true, although no express adjudication may be made, and though the court proceed directly to decree the injunction.

The injunction, if decreed, would limit the use of the water of defendant Rickey in the State of California. This is accented by the respondent's claim that the decree would so impress the real property, water of defendant Rickey as to

bind his successors in estate, as privies, under the rule of *lis pendens*. The decree sought is not, therefore, one purely *in personam*. The respondents would not contend that the decree will be *in personam* against the defendants whose claims are to the water in the State of Nevada. As to such defendants, the respondents cite the case of Ahlers *vs.* Thomas, 24 Nev., 407, as to the effect of the decree. There it was held to impress the title to the defendant's real property, so as to create a privity binding the successor in estate. The decree sought against all the defendants, including the defendant Rickey, is the same, and is based upon the same allegations of facts. Suggesting this last point in another way, suppose the defendant Rickey had claimed rights in the water in Nevada and also in California. What, then, would have been the effect of the decree of injunction? It would certainly have impressed itself upon the title to the rights of defendant Rickey in Nevada. It would not have done so in California, because the real property there involved was not within the jurisdiction of the court. Yet the decree would not have been at the same time against the defendant Rickey *in personam* as to his rights in California and *in rem* as to his rights in Nevada.

At page 20 of respondent's brief, in case No. 89, is cited the case of Taylor *vs.* Hulett, 97 Pacific, 37, to the effect that the court of the lower State on a stream can quiet the title to the owner of water in an upper State, and that, too, where the defendant owning water in the upper State is not a citizen of the lower State wherein is held the court. This decision is rested upon the authority of the case now under review, and without any independent reasoning. Logically, the Court of Appeals decision in this case lends much support to the conclusion in the Idaho case. The Idaho case is, however, not in harmony with the great current of authority, and does not seem to meet with the approval of counsel (see top of page 23 of counsel's brief in No. 89). In this Idaho case, it is asserted that the decree in the court of a

lower State can be made effective against the title in the upper State by the force of the full faith and credit clause of the Federal Constitution. In this manner the policies of the lower State may be forced upon the upper State. In the case of Kansas *vs.* Colorado, 206 U. S., 95, this court said: "Neither State can legislate for or impose its own policy upon the other." If it cannot be done by legislative enactment, nor by constitutional provision, it cannot be done by a court, the creature of either. The State's integrity cannot be destroyed by judicial decree of foreign jurisdictions, affecting the titles to its realty. While, therefore, support may be found for the Idaho case in a decision of the Court of Appeals in this case, we insist that both decisions are wrong.

If both actions, the one in the Federal court and the two in the State court, should go to judgment *pro confesso*, there would be a decree in the Nevada court either *in personam*, or quieting title to the part of the stream in Nevada, and a decree in the State of California quieting title to the part of the stream in California. There would be no concurrent jurisdiction and no impairing of jurisdiction, or interference with process. It would only be when the decree in Nevada was asserted as affecting the title in California that the two decrees would cover the same ground. If, as counsel claim, such a decree in Nevada would act *in personam*, or, as we claim, would quiet title in Nevada, there would be no conflict of jurisdiction.

Counsel has cited many cases where damages were sought to be recovered for injuries inflicted where the act of trespass was in another county or State. In none of these cases would the decree when rendered affect the title of defendant to real estate, or the use of real estate, in another State except the cases of Wiley *vs.* Decker, 73 Pacific 210, and Taylor *vs.* Hulett, 97 Pacific, 37. In the suits for damages cited, either the place where the wrongful act *was committed* or the place where its consequences resulted in damages is held to be venue. In the case of an injunction to protect property from

a threatened trespass the two elements do not exist. The resulting damage has not occurred, and therefore has no locus. The property threatened with invasion is the only one of these two things to locate the venue where a preventative injunction is sought. Such a suit looks entirely to the future, not to the past. The water may today be used on one piece of land, tomorrow on another, and the third day it may be used for power or sold for municipal uses, and the water right in the stream be protected at all times against invasion by diversion. The water right inheres in the stream and the locus of the stream determines the venue of any proceeding which will affect the title to its waters. And the particular State where the right to invade it is claimed determines the forum of the trial of that right. This forum is exclusive, not concurrent, as to the determination of that right.

Stillman *vs.* White Rock Mfg. Co., 3 Wood and M., 538.

Gould on Waters, 3d ed., sec. 446.

Encyclopedia of Pleading and Practice, p. 1106, vol. 14.

Section 738, Revised Statutes, determines the place of trial of local actions in Federal courts.

Texas Pacific Railroad Co. *vs.* Gay, 86 Texas, 571.

U. S. *vs.* Winan, 73 Fed., 72.

Grove *vs.* Grove, 93 Fed., 865.

We have already commented upon the case of Taylor *vs.* Hulett. In the case of Wiley *vs.* Decker the plaintiffs diverted the water from the river in the State of Wyoming. Some of the plaintiffs used water from a ditch, into which they diverted the water in the State of Wyoming; others of the plaintiffs carried the water in the same ditch into the State of Montana, and there used the water. The defendants diverted the water in the State of Montana, and conducted

the water into the State of Wyoming, where they used it to irrigate land in the State of Wyoming. So far as any question is now before this court, these are the only facts material. The water flowed from the State of Montana into the State of Wyoming in a natural stream. The suit, therefore, was brought in the lower of the two States, and the injunction was sought to prevent water being diverted in the State of Montana, which water, however, was used by the defendants in the State of Wyoming.

This use of the water in the same State where the court held jurisdiction is one of the limitations expressly put upon the rule announced in the case.

Speaking of the facts, the court said, at page 213 of the report of the case in volume 73 of the Pacific Reporter:

> "It is greatly to be regretted that in the determination of a question of such manifest gravity, the court has not been favored with a brief or argument on behalf of defendants."

That the fact that the water was used in the State of Wyoming by the defendant was important in consideration of the question is disclosed by the frequent allusions to it.

At page 212, at the top of the second column, the court says:

> "It is agreed, however, that they (defendants) own lands in the county, and that their diversion of the water is for the purpose of irrigating those lands."

In a statement in the same column, on page 212, of questions submitted to the court, where the defendant's rights are again alluded to, it is stated:

> "Has the District Court of Sheridan County, Wyoming, any jurisdiction under the facts stated, to prevent the diversion of water from said creek in Montana, and to prevent its being conveyed by private ditch from said State of Montana into the said State of Wyoming, and its use in said last-named State on lands of the defendants?"

So far as the discussion in Wiley *vs.* Decker applies to anything in this case, it commences at the bottom of first column of page 223. The jurisdiction of the court in that case to prevent the defendant from diverting water in Montana is placed upon the fact that injury occurs to the lands of the plaintiff in the State of Wyoming, and this, too, although the action is not one for damages, but for an injunction. We contend that the location of the injury in that case, so far as the action for an injunction is concerned, as well as the trespass itself, was in the State of Montana. The court, at column 1, page 224, say:

> "The diversion made by the other defendants occurs in Montana and, although they conduct the water so diverted to and upon lands within this State, the act of diversion occasions the injury complained of, and the wrongful act therefore, if any, occurs in Montana, while it is equally obvious that the locus of the injury to plaintiffs Boyle, Foss and Verley is in this State where their ditch and land are situated."

Both of these statements by that court—one obvious, the other, as we contend, entirely wrong—is necessary to the decision in the case. We do not think it can be maintained that "it is equally obvious that the locus of the injury of plaintiffs Boyle, Foss and Verley is in this State (Wyoming), where their ditch and lands are situated." It is true there is a consequential injury which results there, but the injury and wrong which it is sought to enjoin is the injury and wrong where the trespass is committed on the plaintiff's rights. The plaintiff's rights existed in the stream in Montana, provided the laws of Montana recognize such rights, as they did in that case. Having rights there, they were trespassed upon at that place.

The court, at column 2, page 226, said: "If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting the title to the lands of plaintiffs in another State, it is quite obvious that it would be beyond

the jurisdiction of the court." If in the case of Wiley *vs.* Decker the court had no jurisdiction to determine the title in Montana, then the jurisdiction which it did assert must have been personal, and rested entirely upon the fact that the defendant had been served with summons and appeared.

At the bottom of column on page 224, in the case of Wiley *vs.* Decker, there is a quotation from Judge Holmes in the case of Manville Co. *vs.* Worcester, 138 Mass. The quotation is only partial, however, and Judge Holmes, as will be seen by reference to the decision itself, was speaking of an action for damages. He was not considering an action for an injunction, or to determine title in a foreign State further than such inquiry might be incidental to the question of damage. The full quotation (italics ours) is:

> "If the plaintiff's mill were in another county of this State, an *action for damages* would rightly be brought in Worcester, not alone by the public statutes, but by common law. * * * As between two States, both of which recognize the right, if the rule is to vary at all, it should be on the side of greater liberality, to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained."

This rule of necessity announced by Judge Holmes cannot be involved in this case, because the courts of California were accessible to accomplish, as between Rickey and complainant, all the purposes sought to be accomplished in the suit brought in Nevada.

The case of the California Developing Company *vs.* The New Liverpool Salt Company, 172 Fed., 792, was a case where the defendant brought water into the State of California and there permitted it to flood the lands of plaintiff. The court did not undertake to determine the defendant's right to the water. That was conceded. The use in the State of California to the injury of complainant was prohibited. The rule there would have been the same had the defendant brought the water in a cup from a well.

All conflicts in jurisdiction referred to on pages 22 and 23 of respondent's brief in No. 89 disappear when the jurisdiction is properly limited.

We again assert that there was no concurrent jurisdiction in the two courts, and therefore the Circuit Court should not have enjoined the petitioner from prosecuting the actions in Mono County, Cal.

Sec. 720, Revised Statutes.

Jurisdiction in Circuit Court of Nevada to Entertain the Cross-Bills to Determine the Rights Between the Defendant Rickey and the Other Defendants, Cross-Complainants.

These cross-complainants were residents of the State of Nevada and so was the defendant T. B. Rickey. The rights sought to be determined between the cross-complainants and the defendant, T. B. Rickey, were like the rights sought to be determined between the complainant, Miller & Lux, and the defendant T. B. Rickey. To sustain the jurisdiction of the court as between the complainant, Miller & Lux, and the defendant Rickey there was the fact of citizenship in different States. This fact did not exist to support the jurisdiction of the court in determining the controversies made by the cross-complaints. The only jurisdiction claimed was ancillary to the controversy made by the original complaint.

Ancillary jurisdiction is an incident to the jurisdiction of the controversy made by the complainant. It grows out of necessity, in order that the court may do complete justice, *as to that controversy*, between the parties to the suit. It is not a rule of convenience. We have discussed this question at length at pages 68 to 80 in the brief filed in support of the petition for certiorari. To what is there said, I wish to review the case of Ames Realty Co. *vs.* Big Indian Mfg. Co., 146 Fed., 166, relied upon by respondent.

If, as respondent contends, the properties, subject to the action in the Circuit Court of Nevada, is the land of complainant and the water appurtenant to it in Nevada, and the jurisdiction of that court is personal over T. B. Rickey and the other defendants, to prevent each of them from committing a several trespass, then it would be difficult to see how a defendant could by a cross-complaint against his co-defendant assert anything defensive. His and his co-defendant's trespasses, under that assumption, would be separate, and none of them assert any interest in the land of complainant or its appurtenances the subject of the action.

The right to a cross-complaint in aid of a defense only arises when we reject the respondent's claim of jurisdiction *in personam*, and treat the action as one directly affecting land within the court's jurisdiction. Such was the facts and the nature of the case in Ames Realty Co. *vs.* Big Indian Mfg. Co. In that case the court had jurisdiction of the rights to the stream of all the defendants between whom it undertook to decree the title to the water or its use. Such is not the case here, however, as to the defendant Rickey.

The mere fact that the cross-bill pertained to certain part of the water in the Walker River, and the original bill also pertains to another part of the water of Walker River, does not, as we understand it, make the cross-bills ancillary to the main action. More than this must appear. There must be a relation between the cross-bills and the original bill which pertains to the controversy made about the water in the original bill, or pertains to some defense that the cross-complainants make to the controversy made by the original bill.

An entirely independent and different controversy between two defendants, although the thing about which the controversy as had is the same, does not determine that a cross-bill is ancillary. The cross-bill therefore must relate to the defense that the cross-complainants make against the original controversy. For instance: In this case, if the cross-

complainants admit the right of Miller & Lux as set out in the original bill (and there is nothing in their complaint herein to show that they did not, an absence which we contend is fatal to their showing; *Stewart vs. Hayden*, 72 Fed., 402), then there would be no defense to the original controversy to which a cross-bill could be ancillary.

Stewart *vs.* Hayden, 72 Fed., 402.

We assert, therefore, that the cross-bill in the Federal Court to be ancillary and to be permitted, *where the parties to the cross-bill are citizens of the same State,* must be in aid of the defense made by the cross-complainants to the original controversy.

If this were not the rule, the rights of citizens of the same State to have their rights, as between themselves, determined by the State jurisdiction, could be entirely defeated by procuring a suit to be brought in the United States courts wherein they could be made defendants, and the court under such an interpretation of ancillary jurisdiction, would proceed to hear and determine their rights.

It was held in *Stewart vs. Hayden*, 72 Fed., 402, that when the defendant seeking to file the cross-bill confesses the cause of action in the original bill, that he has no ground to file the cross-bill, the court there saying:

> "Tested by these rules the pleading filed by Grutter & Goers was not a cross-bill. It was not brought in aid of their defense to the original suit, for they had none."

This is but another way of saying that the cross-bill must be in aid of a defense. I think these authorities conclusively establish that a cross-bill must be in aid of the defense, or there must be a necessity for it in order that there may be a full and complete adjudication of *the controversy*. That is, the controversy made by the original bill.

If a full and complete determination of the controversy cannot be had in this suit without the defendants, between

themselves, litigating their respective rights to the waters of Walker River, then it would seem to follow that every person claiming rights in the Walker River would be a necessary party defendant, and that the bill should be dismissed without such parties are made defendant.

This necessity for other parties was held not to exist according to the ruling of Judge Hawley in this case, on demurrer, 127 Fed., page 573.

And see

Union Mill & Mining Co. *vs.* Danberg, 81 Fed., 73.

The jurisdiction of the United States Court is of *a controversy* between citizens of different States. It has no jurisdiction except of such controversy. This excludes independent controversies of all characters, and under all circumstances, however, the same may be presented, and however the same might arise *between citizens of the same State.* So that in order that any controversy between citizens of the same State may be tried in the Federal Court, it is absolutely necessary that such controversy in some manner relate to the original controversy. The mere fact alone that the trial of such controversy between citizens of the same State will lead to the fuller determination regarding a thing, about which some proceeding is before the court, is not sufficient to confer jurisdiction upon the Federal Court. It is necessary, not alone that a fuller determination might be had, but that the fuller determination shall be of the original controversy, set out in plaintiff's bill of complaint.

Where the cross-bill introduces a controversy between defendants *resident of the same State,* it is not a question of equity practice alone which must determine the right to file the cross-bill, but it is one coupled with jurisdictional power of the court.

The discretion of a court of equity does not exist until after its jurisdiction exists. Its discretion must be within the jurisdiction conferred and cannot be outside of or beyond

it. So that the liberal rules resting in a court of equity with regard to discretion cannot carry the exercise of that discretion beyond the limitation of its jurisdiction. In this case, therefore, the jurisdiction of the court to try the controversy between Rickey and his codefendants, citizens of the State of Nevada, cannot rest in the discretion of the Federal court. It must find a resting place and foundation in some connection with the original controversy set forth in the complainant's bill of complaint. This is what we understand to be the ancillary jurisdiction, where the Federal courts are authorized to try controversies between citizens of the same State.

In Vannerson *vs.* Leverett, 31 Fed., 376, Vannerson & Leverett were sued in a creditor's bill in the United States Court as copartners. Vannerson by cross-bill sued Leverett to determine the indebtedness between them as copartners. Vannerson & Leverett were citizens of the same State. The court said:

> "If it be true that Vannerson & Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross-bill filed to an original bill against them both which he could not have obtained by original bill here; and in other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies *inter esse* in this court. * * * Most clearly, if the pela is true Vannerson had no standing in this court as a suitor by original bill. He prayed no relief against Bates, Reed, and Coolley. His cross-bill has no relation to the subject-matter of their suit, nor is this cross-bill in any sense a reply to allegations in the original bill. The Circuit Court of the United States is limited in its jurisdiction, and, when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted. * * * The limited jurisdiction of the courts of the United States cannot be enlarged by the action of the parties litigant therein, and if the want of

> jurisdiction at any time appears, the court, *sua sponte*, will raise the question whether the parties had or had not. The argument that the original bill was a creditor's does not and cannot enlarge the jurisdiction of a court so limited, nor does the argument *ab inconveniente* of the solicitor for the complainant have any place in such a court."

For this additional reason, this lack of jurisdiction in the court to hear the controversy made by the cross-bills, because the parties are both residents of the State of Nevada, the cross-bills should not have been filed and therefore furnished an insufficient foundation for the judgment restraining the prosecution of the action in Mono County.

In an action to quiet title to water the plaintiff's complaint determines the limits of the thing to be inquired into. If the plaintiff in an action to quiet title alleges ownership in a lot, no defendant can extend the inquiry to another lot or to any other property. In this case Miller & Lux have fixed the limits of the inquiry to a certain 943 29/00 cubic feet of water per second which it claims a prior right to receive and use. This claim is made up of the quantity of water and the relative time of its use. No controversy can arise in this case unless it is with reference to this quantity of water or to the time of its use. The cross-complainants concede all the rights claimed by the complainants Miller & Lux and assert no claim whatever against the complainants. In the case of Ames Realty Co. *vs.* Big Indian Mining Co. the cross-complainants asserted rights against the complainant as well as against their codefendants. Even under the facts of that case Judge Hunt did not feel secure in resting his ruling upon the right of defendants as between themselves to file a cross-bill, but fortified that by placing his decision ultimately upon the procedure authorized by the statute of the State, which he adopted. Says that judge: "But if under the old chancery practice, no affirmative relief could be given to these defendants, under their cross-

bills, still the courts of the United States will not deny jurisdiction to proceed under the statute of the State already quoted."

All of Judge Hunt's conclusions as to what is the rule independent of statute are contained in the latter part of the paragraph at top of page 172. The learned judge there says: "Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the question in the affirmative." Is the determination of such property right ancillary in the sense in which that character of jurisdiction is understood? We have always understood this rule of ancillary jurisdiction was a rule of necessity, which rule aided the defendant in putting in his full defense to the controversy made by the original bill. If such ancillary jurisdiction was meant by Judge Hunt, then his answer should have been in the negative, because the very next sentence shows that a full determination of the original controversy could have been had without the cross-bills. The judge says, "It is true that if complainant can secure protection of its own rights junior appropriators might be left to fight out their respective rights among themselves. And we claim that this sentence covers our case, and shows that the controversy made by the cross-complaints is not ancillary. We are unable to reconcile Union Mill and Mining Co. *vs.* Dauberg, 81 Fed., 73, and the decision on demurrer in this case of Miller & Lux *vs.* Rickey, 127 Fed., 537, with the rule announced in this Ames Realty Co. case, as to the right of the defendants between themselves to determine their rights to the stream. In both of these last-named cases it was held that parties not made defendants, but who diverted water from the stream need not be made parties defendant. They would be necessary parties if, as said by Judge Hunt, "it is impossible to make a just decree between complainant and one defendant without ascertain-

ing rights of defendants as against one another." Since a "just decree" must always be rendered, and all parties must be before the court so that a "just decree" can be rendered, it would follow from Judge Hunt's reasoning that all the persons diverting water must be before the court, and that the complainant's bill will be dismissed unless he brings them all in, so that a "just decree" can be rendered as to the defendants. This is contrary to the decisions cited.

If the defendants other than Rickey can file cross-bills against him to assist their defenses to the main controversy, then he should have the same privilege against them. He cannot do this because his rights to the water are confined to the portion of the stream in California, which portion of the stream is without the jurisdiction of the Circuit Court of Nevada. If the cross-bills here are permitted as against the defendant Rickey, he is denied the same right to have his claims adjudicated affirmatively between himself and his co-defendants.

As to rules determining when cross-bills can be filed generally we refer to the authorities filed with our petition herein.

New parties cannot be introduced by a cross-bill.

Shields *vs.* Barrow, 17 How., 130.

Bates Eq. Pro., §§ 374-5.

To this point we have argued the jurisdiction of the court as though defendant Rickey still owned the property in California and as though he was the plaintiff in the suits in Mono county. That manner of presenting the argument was also adopted in the brief accompanying the petition to this court.

Identity of Rickey and the Petitioner.

To justify the order of injunction against the petitioner here, the respondent asserts the identity of Rickey and the Rickey Land and Cattle Co. This identity was evidently

found against this position of the respondent, because the court relied upon the rule of *lis pendens*, which assumes privity not identity. The facts are also to the contrary. Charles Rickey owned $20,000 *in value* of the capital stock of the corporation and Alice B. Rickey owned stock of the same value, pages 18 and 19, folios 39-41. Respondent also suggests that the Rickey Land and Cattle Co. should be considered as the defendant T. B. Rickey, because there is no statement in the affidavit that either Alice B. Rickey or Charles Rickey acquired their stock in the corporation by payment of a valuable consideration. Respondent concludes from the silence of the affidavit that they paid nothing whatever. We do not know how this conclusion of fact follows, particularly when the burden of showing facts to justify the injunction prohibiting the prosecution of the actions in Mono county was upon the respondent. Regardless of this, however, it seems to be entirely immaterial, so far as the doctrine of *lis pendens* is concerned. The rule where applicable is binding whether the transfer is a gift or for the most valuable consideration. On the question of the identity of T. B. Rickey and the Rickey Land and Cattle Co., the question of consideration paid by Alice Rickey and Charles Rickey for the capital stock of the corporation owned by them is not material. There is no interest claimed by any party to the suit in the thing transferred. There is no question to be affected by the doctrine of *bona fide* purchaser or where the question of notice or consideration becomes material. Defendant Rickey could give or sell to other members of the corporation without violating any rights of the complainant or of the cross-complainant. After he had given or sold, the interest given or sold would belong to the donor or purchaser as absolutely in the one case as in the other.

The allegation in the complaint attributing to the defendant Rickey an intention to defeat the jurisdiction of the Circuit Court of Nevada by filing complaints in the State Court

of Mono county is denied by Mr. Rickey at pages 16 and 17, folios 35-36. At folio 37 the defendant Rickey states the reason for commencing the action in the State Court.

Rule of Lis Pendens Erroneously Applied in This Case.

We contend that any judgment in the original case of Miller & Lux *vs.* T. B. Rickey and others must, because of the limit upon the jurisdiction of the Circuit Court of Nevada, be one *in personam* against Mr. Rickey, and that doctrine of *lis pendens* will not apply to the lands situated in the State of California, and that therefore the Rickey Land and Cattle Company would not, as to the lands in the State of California, be bound in any manner by such judgment.

Second. That any judgment that might be rendered in the suit of Miller & Lux could not affect the title of lands in the State of California.

In speaking of such a judgment *in personam* Judge Fuller, in the case of Carpenter *vs.* Strange, 141 U. S., 87, says:

> "While by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title * * *
>
> "Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained of the person notwithstanding lands not within the jurisdiction may be affected by the decrees (Massey *vs.* Watts, 6 Cranch, 148) yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated."

Pomeroy's Eq. Jurisprudence, in sec. 298, says:

> "It should be carefully observed however that a decree in such a suit directing a conveyance of the land under the contract, or in pursuance of the trust or directing a sale or conveyance of the partnership land, or a transfer of the estate affected by the fraud,

> only binds and operates upon the person of the defendant; it is not of itself a muniment of title and does not of itself transfer any title."

In Watkins *vs.* Holman, 16 Peters, 25, the rule is announced:

> "The court of chancery acting *in personam* may well decree the conveyance of land in any other State and may enforce their decrees by a process against defendant, but neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

If, then, any decree that may be made in the Federal Court in Nevada in the suit of Miller & Lux cannot affect the title of lands in the State of California, the doctrine of *lis pendens* would not apply so as to make such decree binding upon the Rickey Land and Cattle Company. Therefore the decree restraining the prosecution by the Rickey Land and Cattle Company of the actions in Mono County to quiet its title is erroneous.

The doctrine of *lis pendens* has no application to a judgment that is personal.

> Baltimore & Ohio Co. *vs.* Wabash Railroad Co., 119 Fed., 678.
>
> Merritt *vs.* The American Company, 79 Fed., 228.

The doctrine of *lis pendens* is confined to the territorial jurisdiction of the court and does not cross beyond it.

> Carl *vs.* Lewis Coal Company, 96 Missouri, 149.
>
> Sheldon *vs.* Johnson, 4 Sneed (Tenn.), 683.

Another rule of *lis pendens* is that the complaint must specially describe the property to be affected, so that the purchaser from the defendant may be able, by examining the records, to ascertain what particular property of the defendant is the subject of litigation.

In the complaint of Miller & Lux there is no attempt whatever to describe the property of Mr. Rickey to be affected by the litigation, so that the purchaser from Mr. Rickey could not, even if the law required him to examine the records of Nevada, when purchasing property in the State of California, have ascertained what property was affected by the litigation.

In Black on Judgment, at section 550, the rule is stated as follows:

> "It is also said that two things seem to be indispensable to give effect to the doctrine of *lis pendens:*
> "First: That the litigation must be about some specific thing which must necessarily be affected by determination of this suit; and second, that the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation."

Mr. Freeman, in his work on Judgment, at sections 196 and 197, states the rule as follows:

> "To determine whether an action or proceeding will put in operation the doctrine of *lis pendens*, one must inquire whether this object is to affect specific property or not. If the relief sought includes the recovery of possession or the enforcement of a lien or the cancellation or creation of a muniment of title or any other judicial action affecting the title, possession or right of possession of specific property, real or personal, then there is or may be a *lis pendens* sufficient to bind all subsequent purchasers or incumbrancers If on the other hand no specific property has to be recovered, there is no *lis pendens*.
> "It is further essential to the existence of *lis pendens* that the particular property involved in the suit be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril."

Also see—

Houston *vs.* Timmerman, 17 Oregon, 499.
Bates *vs.* Gillette, 30 Fed., 685.

The complaint specifically described the property of Miller & Lux, which was the subject of the suit, but attempted no description of the property of Mr. Rickey; therefore, independent of the other reasons herein stated why the doctrine of *lis pendens* would not apply, the failure of a description would exclude the doctrine as against a purchaser from Mr. Rickey.

There is no allegation in the complaint that the organization of the corporation, The Rickey Land and Cattle Company, was for the purpose of defeating in any way the jurisdiction of the court of Nevada. There is no allegation of any attempted fraud.

In order that any decree of injunction rendered by the Federal court in the suit of Miller & Lux might be binding upon the Rickey Land and Cattle Company, one of three conditions would be necessary:

First. The Rickey Land and Cattle Company would have to be a party to the suit.

Second. The Rickey Land and Cattle Company would have to be bound by the judgment rendered under the doctrine of *lis pendens*, in which instance it would seem that the proper proceeding for the plaintiff would have been to have made the Rickey Land and Cattle Co. a party defendant to the original suit of Miller & Lux. This they have not done. And if our contention in this case is correct, the doctrine of *lis pendens* has no application, and it is probable that the court would not have made the Rickey Land and Cattle Company a party to the original suit of Miller & Lux if application had been made.

Third. The identity of the Rickey Land and Cattle Company and Thomas B. Rickey as one and the same person under different names would have to be established, so that the change in name would be a mere immateriality, the substance of ownership being the same. In such a case, with the proper allegation of fraud and of fraudulent intention, the court might ignore the change of name and enforce the

decree. In this case, however, the fact of identity between Thomas B. Rickey and the Rickey Land and Cattle Company is not established, and there are no allegations of fraud sufficient to justify the court in ignoring the actual facts as they exist, and in treating the Rickey Land and Cattle Company otherwise than as the successor of T. B. Rickey.

But, admitting for the sake of argument the application of the doctrine of *lis pendens* as to any judgment between Miller & Lux and T. B. Rickey, how could any such doctrine aid the complainants herein, who had not, at the time of the commencement of the suits in Mono county, filed their cross-complaints in the Miller & Lux suit in Nevada.

Does the doctrine of *lis pendens* compel a purchaser to anticipate that some person is going to make a claim? If it requires the purchaser to be bound by a judgment in a pending suit, does it also bind him to a judgment upon facts which at the time of purchase had not been asserted in any form of legal proceedings?

Summary.

First. In the original suit of Miller & Lux, the Federal court of Nevada had no jurisdiction to try and determine the rights of T. B. Rickey to the waters in the State of California, and the Federal court, having no such jurisdiction, the prosecution of the action in Mono county could not in any way conflict with it.

Second. That any judgment rendered in the original action in the Federal court would necessarily be *in personam*, and would not affect the title of the property of T. B. Rickey in the State of California, and therefore such judgment would not be binding, under the doctrine of *lis pendens*, against the successor in interest to T. B. Rickey to the property in the State of California, the Rickey Land and Cattle Company.

Third. That the jurisdiction of the court is not extended by the cross-bills, and the court has no jurisdiction under the cross-bills, for the same reason that it had no jurisdiction in the original bill, to try the title of T. B. Rickey to waters in the State of California.

Fourth. The Federal court had no jurisdiction as between the cross-complainants and T. B. Rickey to try the title of T. B. Rickey to the waters in the State of California. This for the same reasons that it had no right to try the title of T. B. Rickey in the State of California as between Miller & Lux and T. B. Rickey. As to the cross-bills, the same not being filed before the time of the purchase by the Rickey Land and Cattle Company of the interest of T. B. Rickey to the waters in the State of California, the doctrine of *lis pendens* would not apply so as to give notice of the claims made in the cross-bills in advance of its commencement.

Fifth. That the cross-bills upon which the ancillary bill for injunction was based was not proper proceedings in the original action: (*a*) because it was not filed in aid of any defense or discovery or for the purpose of a full determination of the controversy set out in the original bill; (*b*) because it sought to have tried by the Federal court of Nevada an independent controversy between citizens of the State of Nevada, and therefore the court had no jurisdiction of such independent controversy.

Sixth. The ancillary bill of *complaint* in this case against the Rickey Land and Cattle Company is against a corporation not a party to the original action.

Seventh. The prosecution of the action in Mono county, assuming a jurisdiction to exist in the Federal court of the same subject-matter, did not impair, interfere with or restrict in any manner the full exercise of the jurisdiction of the Federal court. And if the actions to quiet title in Mono

county can not now be maintained, they never can be, because they will after judgment in the Federal court be as objectionable as they are now, and as the injunction prayed for is perpetual, it follows that the title to this property can never be quieted.

The appellant, for the reasons herein stated and the rules of law herein adduced, respectfully submits that a judgment of the Circuit Court of the United States, Ninth Circuit, District of Nevada, enjoining the prosecution of the suits in Mono county as to Miller & Lux and as to Henry Wood, James O. Birmingham, Charles Snyder, and Charles Johnson should be reversed.

JAMES F. PECK,
CHARLES C. BOYNTON,
Attorneys for Petitioner